TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 306.

LYDIA BRADLEY, PLAINTIFF IN ERROR,

vs.

H. W. LIGHTCAP.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JUNE 1, 1903.

(18,957.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1903.

c Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said plea and suit between Lydia Bradley, appellant in said supreme court of Illinois, and H. W. Lightcap, appellee in said supreme court of Illinois, the said suit being an appeal from the circuit court of Fulton county, Illinois, in a certain bill in equity for injunction and relief, wherein said Lydia Bradley was complainant and H. W. Lightcap defendant; wherein was drawn in question the validity of a statute of and of an authority exercised under the United States and the decision was against their validity; and wherein was drawn in question the validity of a statute of and of an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution of and a statute of the United States, and the decision was against the title, right and privilege and exemption specially set up and claimed under such clause of said Constitution and under said statute of the United States;— a manifest error hath happened, to the great damage of the said Lydia Bradley, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and three.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States
for the Northern Dist. of Illinois.

Allowed to operate as a supersedeas, by
BENJAMIN D. MAGRUDER,
Chief Justice of Supreme Court of Illinois.

d [Endorsed:] 2846. Original Supreme Court of the United States. Lydia Bradley plaintiff in error *vs.* H. W. Lightcap defendant in error Writ of error. 2.24 Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, northern district of Illinois. Copy deposited for the defendant in error in the clerk's office of the supreme court of Illinois at Springfield Illinois also.

UNITED STATES OF AMERICA, } *ss:*
Seventh Judicial Circuit, Northern District of Illinois, }

I, *Marshall E. Sampsell*, clerk of the United States circuit court in and for said seventh circuit and northern district of Illinois, *do hereby certify* that in the cause wherein Lydia Bradley is plaintiff in error and H. W. Lightcap is defendant in error, more fully described in the within and foregoing copy of writ of error, a true copy of the writ of error issued by me on the eighteenth day of May, A. D. 1903 (and of which the within and foregoing copy of writ of error is also a true copy), was on the eighteenth day of May, A. D. 1903, deposited in my office in Chicago for the defendant in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States circuit court for the northern district of Illinois, this 18th day of May, A. D. 1903.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, Northern Division, }

I have served this writ within my district by reading the same to and in the presence and hearing of the within named H. W. Lightcap, at the same time delivering to him personally a true copy thereof on the 22nd day of May, A. D. 1903.

JOHN C. AMES,
U. S. Marshal.
WM. E. CASS, *Deputy.*

1 service	2.00
5 miles	.30
	2.30

e In the Supreme Court of Illinois.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } No. 2865. Appeal from Fulton County.

I, Christopher Mamer, clerk of the supreme court of Illinois, do hereby certify, that on the 26th day of May, in the year of our Lord one thousand nine hundred and three, a copy of the foregoing writ of error for the defendant in error, was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said supreme court, this 26th day of May, A. D. 1903.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

f In the Supreme Court of Illinois.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } No. 2865. Appeal from Fulton County.

I, Christopher Mamer, clerk of the supreme court of Illinois, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto do hereby certify that the following pages numbered from 1 to 137 both inclusive contain a true, perfect and complete copy of the record and of the assignment of errors and of all proceedings in the case had in said court, including a certified copy of the opinion of said court as the same remain of record and on file in my office, and that pages 122 to 137 both inclusive, contain a true and correct copy of the petition and order for writ of error, bond for costs and the assignment of errors upon said record filed in my office on the 26th day of May A. D. 1903, the original of which remains on file in said court.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed at Springfield, Illinois, this 26th day of May in the year of our Lord one thousand nine hundred and three.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHRISTOPHER MAMER,
Clerk of Supreme Court.

1 At a supreme court, begun and held at Springfield on Tuesday, the second day of December, in the year of our Lord one thousand nine hundred and two, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice, Jacob W. Wilkin, justice, Joseph N. Carter, justice, James H. Cartwright, justice, Carroll C. Boggs, justice, John P. Hand, justice, James B. Ricks, justice, Howland J. Hamlin, attorney general, Benjamin H. Brainerd, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that, to-wit: on the second day of December, A. D. 1902, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Fulton county, which said transcript is in the words and figures following, viz:

2 UNITED STATES OF AMERICA, } ss:
State of Illinois, County of Fulton, }

Pleas before the Honorable John J. Glenn, one of the three judges of the ninth judicial circuit of the State of Illinois and presiding judge of the circuit court of Fulton county, in the State aforesaid, at a term thereof begun and held at the court house in the city of Lewistown, in said county, on the nineteenth day (the same being the third Monday) of May, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

Present: Honorable John J. Glenn, judge. E. W. Keefer, master in chancery, J. C. Severns, clerk, L. C. Fouts, sheriff.

Attest: J. C. SEVERNS, *Clerk.*

Court opened by proclamation.

And be it remembered that afterwards, to-wit: on May 26, 1902, the same being one of the regular days of said term of said court, a certain bill for injunction was filed with the clerk of the court, which said bill is in the words and figures following, that is to say:

3 STATE OF ILLINOIS, } ss:
County of Fulton, }

In the Circuit Court in and for said County of Fulton, Being in the Ninth Judicial Circuit of Illinois.

To the honorable the judges of said court, sitting in equity:

Your oratrix, Lydia Bradley, respectfully represents unto this honorable court that she is a citizen of the county of Peoria in the State of Illinois, residing at the city of Peoria; that the defendant H. W. Lightcap, is also a resident of the State of Illinois, his place of residence being in the county of Cook.

That heretofore, on the 30th day of June, 1867, oratrix was the owner and holder of a certain mortgage given by Thomas B. Breed-

love to secure the sum of $19,616.00 on 1200 acres of land in the county of Mason, State of Illinois, described as the northeast quarter of section twenty-two (22), the east half of the southeast quarter of section twenty-two (22), the south half of section twenty-three (23) and all of section twenty-six (26), in township twenty-three (23) north, range six (6) west of the third principal meridian; that afterwards said Breedlove and wife conveyed said premises, subject to said mortgage, to Benjamin S. Prettyman; that afterwards on the 13th day of August, 1868, Benjamin S. Prettyman conveyed a part of said premises, to-wit: the northeast quarter and the north east quarter of the southeast quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of the north half of section twenty-six (26), township and range aforesaid, to Absalom McCune, and on the same day procured from said Absalom McCune a trust deed conveying the last above described premises to E. G. Johnson as trustee for oratrix, to secure the payment to oratrix of three notes which were drawn payable to her order, each for the sum of $5000, due in one, two and three years from date; that afterwards
4 said Prettyman taking the said Absalom McCune trust deed and notes to the agent of your oratrix delivered them to him in part payment of said Breedlove indebtedness and secured from her a release of all the lands not included in the said McCune trust deed, being about 520 acres; that in and by said trust deed it was provided that in case default should be made by said McCune or his heirs, executors or administrators in the payment of said money or any part thereof, or in the fulfillments of the covenants and duties therein contained or imposed or any of them, that then and in that case, on application of your oratrix or the legal holder of said notes, having first given 20 days' notice by publishing the same in a public newspaper printed in the county where said premises are situated, it should be lawful for said E. G. Johnson, his heirs, assigns or attorneys duly authorized to sell the said premises at public sale at such time and place as said Johnson, or his said heirs, assigns or attorneys might appoint, and upon making sale as aforesaid to make and deliver to the purchaser a good and sufficient deed of conveyance in law for the same in fee simple; that afterwards on the 13th day of November, 1868, said Absalom McCune and wife re-conveyed the 680 acres last above described to said Benjamin S. Prettyman; that oratrix held said notes of McCune until sometime in 1871, when she discovered that he had departed from the State of Illinois after the execution of said papers and his residence could not be ascertained; that the lands covered by said trust deed were swampy and practically worthless, and that the portion she had released was the only valuable land in the original Breedlove mortgage; that no taxes had been paid on said 680 acres of land in said McCune trust deed from the date of said trust deed. Thereupon oratrix investigated and found said lands to be swampy and worthless and vacant and unoccupied, and took possession of said lands, and redeemed

said lands from tax sales and paid the current taxes, and after-
5 wards at the March term, 1872, filed a bill in chancery in the circuit court of Mason county, against said Prettyman, McCune and all other persons interested in said real estate, alleging that she had been induced to accept said McCune notes by fraudulent misrepresentations as to the value of the lands upon which they were secured, and praying the court to set aside the release of said Breedlove mortgage and grant a foreclosure thereof upon said 1,200 acres of land; a copy of which bill (except the exhibits thereto) and of the answer of said Prettyman thereto is filed herewith and made a part hereof as "Exhibit A." At the same time and while said bill was pending, in the summer of 1872 oratrix personally entered on said lands and employed one Allison Breedlove, who resided in the immediate vicinity, as her agent and representative to hold and look after said 680 acres of land for her, and put him in charge thereof to rent the same for pasture and cut hay from such lands as were dry enough, agreeing to give him one-half of the net proceeds arising therefrom; that said Breedlove on her behalf and as her agent held active possession of the property and used it in the manner aforesaid, putting up fences as they were needed to keep in stock and cutting and selling hay from such portions of the property as could be mowed, and continued in actual, open, visible and exclusive possession of said 680 acres of land until 1878, at which time oratrix leased all of said lands to one John Coddington and ditched and drained the same so that they could be farmed, and said Coddington received the actual possession of the same from said agent of oratrix, said Breedlove, and from that time forth said Coddington was in the actual, open, visible and exclusive possession of said lands as tenant of oratrix, and gradually reduced them to cultivation, fenced and improved them, erected suitable farm buildings and reduced all of said property to a high state of cultivation. That oratrix joined in forming a drainage district by which all of said lands were thoroughly drained and thereby became of great value as farming lands; that after
6 all the title and right of redemption of said Prettyman had expired and become barred and lost, and after the expiration of fifteen months from and after the master's sale in 1879 hereinafter mentioned was made, and prior to the commencement of the ejectment suits hereinafter mentioned, and relying on her absolute and complete right and title in and to the said 680 acres of land and upon the bar and extinction and loss of the right of equity of redemption of said McCune, or of those claiming under him subsequent to said trust deed to said Johnson your oratrix expended about $5 000 in such drainage district, about $5,000 in improvements and over $5,000 in current taxes upon said property; and that your oratrix by her tenants has remained in actual, open visible and exclusive possession of said 680 acres of land continuously since November 1871, to the present time, and still remains in such possession; and that she has all said time been and is in such

actual possession as owner, claiming to be the owner in fee in said premises.

That said bill in chancery in said circuit court of Mason county was contested by said Prettyman and was pending in said court, until 1879, at which time a decree was rendered by said court adverse to the complainant's prayer, ordering and decreeing a foreclosure of the said McCune trust deed instead of a foreclosure of the said Breedlove mortgage as prayed; a copy of said decree of foreclosure is filed herewith, marked "Exhibit B" and made a part hereof by reference. That pursuant to said decree the lands in said McCune trust deed were exposed for sale by the master in chancery, and oratrix, who was in possession and claiming to own said lands, in order to prevent an adverse claim arising by means of such sale, procured the said lands to be struck off to her for the sum of $10,000. which was applied upon the amount found due upon said McCune notes; leaving a deficit still due from said McCune to her of $21,000.

No personal judgment was obtained against said McCune,
7 who had left the State of Illinois, the service upon him being by publication, but the decree provided that said McCune should remain liable to oratrix for the deficiency remaining after said sale; but no part of said deficiency has ever been paid nor has said McCune returned to this State.

Oratrix further shows that the time allowed by said decree for redemption of said lands from such sale expired on the 27th day of January, 1881, and that no redemption or effort to redeem was made by said Prettyman, McCune or any other defendant in said action, nor did either of them assert any claim to said property or the possession thereof, but oratrix was then and thence continued in uninterrupted, actual, exclusive, adverse possession by her tenants, of the said 680 acres of land hostile to all the world besides; and has thence hither- continued and still continues in such actual and exclusive and adverse possession. That in the year 1885 said E. G. Johnson died intestate leaving him surviving his widow Aurilla E. Johnson, who was his administratrix, and the following named children, viz., Austin F. Johnson, Corilla J. Miller, Harriet A. Johnson, Mary G. Alfs and Nellie K. Brinton, who were his only children, and said widow and children were his only heirs at law—and who were all living and of full age on the 11th day of June, 1894; that on said last named date said heirs at law of said E. G. Johnson, deceased; in pursuance of the power conferred upon them by said trust deed, sold said lands at public sale, in pursuance of due public notice duly published as provided for in said trust deed; that at said sale your oratrix, in order to prevent an adverse claim arising by means of said sale, was a bidder and was the highest and best bidder, and said lands were struck off to her at said sale for the sum of $35,000. And on said last named date in pursuance of said sale said heirs at law of said E. G. Johnson conveyed said lands
8 to your oratrix by an absolute deed of conveyance in fee simple in conformity with the power contained in said Mc-

Cune trust deed, which deed by said heirs at law is ready to be produced by your oratrix.

That long afterwards on the 30th day of November, 1894, there was placed on record in the recorder's office of Mason county, Illinois, a quit-claim deed from said Benjamin S. Prettyman to the defendant, which purported to convey to said defendant said Prettyman's interest in said lands, and purported to have been made and executed on the 4th day of September, 1893. When said deed was in fact made, executed or delivered your oratrix is not informed save by the record of said deed, but she charges that the same was not made, executed or delivered until after said 11th day of June, 1894, and shortly before the recording thereof on November 30th, 1894. But oratrix alleges that at the times when said conveyance was made and recorded your oratrix was in the actual, open and visible possession of said 680 acres by her tenants as aforesaid, and that said Lightcap was by such possession charged with notice of the rights, title, claims and equities of your oratrix; and your oratrix upon information and belief charges that said Lightcap had at and before said conveyance to him actual notice and knowledge of the rights and equities of your oratrix, and that no actual, valuable or real consideration was paid by the defendant, Lightcap, for said 680 acres of land, or for the said conveyance thereof;—and that said Lightcap is contriving how he may deprive your oratrix of her said property under color of the certain statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, hereinafter referred to and quoted, and is subjecting your oratrix and causing her to be subjected to the deprivation of her rights, privileges and immunities in and to said lands, and her property, title and vested rights therein secured by the Constitution and laws of the United States and by the constitution and laws of Illinois and by the law and practice of this people's court of equity by the certain action of ejectment and proceedings therein
9 and means hereinafter set forth; that said deed of conveyance from said Prettyman to said Lightcap is a cloud upon the title of your oratrix and is being used by him in order to accomplish the deprivation of your oratrix as aforesaid, contrary to section 1979 of the Revised Statutes of the United States against such causes and deprivations expressly made and provided. And said defendant is contriving now to wrong and injure your oratrix by claiming to be the owner of said real estate and by trying to take and keep possession thereof, and by denying and slandering your oratrix's title to and right of possession thereof, and which acts, doings and pretenses of defendant are contrary to equity and to the manifest injury of your oratrix in the premises.

On the 13th day of July, 1895, the defendant herein commenced actions of ejectment against the tenants of oratrix in possession of said lands, in the circuit court of Mason county, claiming to be the owner of said lands in fee simple. These cases were consolidated and oratrix as landlord defending was substituted as defendant in said suits, and at the March term, 1896, a trial was had in the cir-

cuit court of Fulton county, to which the cases had been transferred on the motion of your oratrix, resulting in a finding for defendant therein of not guilty, and a judgment in favor of defendant therein. From this judgment the defendant herein appealed to the supreme court of the State of Illinois and at the October term, 1898, that court handed down an opinion reversing said judgment and remanding the cause. At the same term oratrix presented a petition for rehearing, which was allowed, and at the December term, 1896, the case was re-argued. October 19th, 1899, the said supreme court of the State of Illinois re-affirmed its former opinion, but afterwards of its own motion granted a second re-hearing and the case was again argued before the court at the February term, 1900. On the
10 19th day of October, 1900, the final opinion of the supreme court of the State of Illinois was filed, adhering to its order reversing the judgment and remanding said cause for further proceedings in accordance with the views therein expressed. A copy of said opinion is published in volume 186 of the reports of cases at law and in chancery determined in the supreme court of Illinois at pages 510 to 536 thereof and is ready to be produced, and is here referred to as "Exhibit C" and made a part hereof by reference.

That the controversy involved in said litigation was as to the effect of the statute of the State of Illinois, section 30, chapter 77, approved March 22, 1872, in force July 1, 1872, which provides as follows:

'When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time for redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When the deed is not taken within the time limited by this act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed.

In the construction of this statute the supreme court of the
11 State of Illinois in its said final opinion used the following language:

'Before the enactment of the statute rendering a certificate of purchase null and void at the expiration of five years, this court had fixed a limitation which it deemed equitable in Rucker *v.* Dooley, 49 Ill. 377, and when the legislature, acting within their unquestionable powers, changed the rule by this statute, it was upheld as valid in Rhyiner *v.* Frank, 105 Ill. 326. The effect of

the statute has been several times considered, and it is no longer an open question. In Seeberger *v.* Weinberg, 161 Ill. 369, the court, after referring to the statutes said (p. 380): 'If, then, it be assumed, as seems most probable, that Seeberger failed to obtain a master's deed, his right to obtain such a deed is barred by limitation and his certificate of purchase has ceased to be of any validity.' Whether the lapse of time is to be given the effect of extinguishing his right or of merely barring his remedy, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity. At the expiration of five years he became, for all practical purposes, a stranger to the property, and had no more dominion over it or power to convey it than he would have had if he had never had any interest therein. The statute above referred to was considered by this court in Rhyiner *v.* Frank, 105 Ill. 326, and it was there held that where land was sold on execution, and the sheriff's deed was not taken out within five years from the expiration of the statutory period of redemption, the certificate of purchase became void, so that a sheriff's deed subsequently issued thereon is a nullity and passes no title. So in Peterson *v.* Emerson, 135 Ill. 55, it was held that after the expiration of the five years given by the statute for taking out a master's deed the certificate
12 became a nullity, and a court of equity cannot compel or authorize the execution of a deed to the purchaser or his assignee by the officer whose duty it is to make such deeds. Such being the condition of Seeberger's title, it is difficult to see upon what legal or equitable principle he can now be entitled, as against the grantees of Farr, to any portion of the relief prayed for in the bill. His certificate of purchase being *functus officio* and void, he certainly could have no remedy against the heirs or representatives of Farr if they had still retained their interest. No remedy could have been asserted by him upon the certificate, as that had become a nullity; nor could he have enforced any remedy upon the original mortgage, as that remedy had been completely exhausted by the foreclosure and sale." Again in Brown *v.* Ridenhower, 161 Ill. 239, the decisions of the court were reviewed, and it was held that the holder of a certificate of purchase which had become void under the statute has no remedy against the grantees of the mortgagor; 'that he can assert no remedy upon the certificate as that has become a nullity and can enforce no remedy upon the original mortgage as that remedy was exhausted by the foreclosure and sale.' The court repeated what was said in Seeberger *v.* Weinberg, that the purchaser had no further interest in the premises.

In Peterson *v.* Emmerson, 135 Ill. 55, it was held that a purchaser whose certificate had been barred by the statute of limitations has no equitable right to a title. In that case, Elizabeth Emmerson, who was a purchaser under foreclosure in 1871, and had been in possession of the premises since early in 1872, but had not taken any deed on her certificate of purchase, filed her bill to procure a deed. The court said (p. 60): 'It is sticking in the bark to say, that notwith-

standing the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree, by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different
13 person. Such action on the part of the court is a virtual annulment of the mandate of the statute and an infringement of vested legal rights. * * * It does not alter the case that defendant in error has been in actual possession of the land since 1872, claiming ownership, and has paid all the taxes assessed thereon. Such acts do not — take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor. If she has gained any rights by virtue of such possession, claim or ownership and payment of taxes, the courts will, doubtless, if called upon, protect her therein; but surely the existence of such rights, if any there be, does not afford just and equitable grounds for transferring to her a legal title to which she is not entitled under the law of the land.'

Counsel urge that a statute of limitation cannot transfer title, and therefore the failure to take a deed did not transfer title to plaintiff. There is no pretense that a statute of limitation can transfer title, but the certificate of purchase was never color of title. It conferred a right to obtain a title, and recited that at a certain time and upon a certain condition the holder would be entitled to a deed conveying the title; the right so assured to the defendant by the certificate became barred, so that no deed could be taken. The statute took away no vested right or title, but merely provided for the neglect of the defendant to take out a deed, so that the right to receive a deed conveying the legal title was lost. All limitations are in the same category. As against every right, except that of the purchaser, the law recognizes the mortgagor or his grantee as the owner of the premises, and her right and lien have been barred and the title has been freed from it.'

But your orator respectfully shows that the statute thus construed by the court as divesting her of all right, title or interest to said premises by reason of her failure to take out a deed on the certificate of purchase hereinbefore set forth was enacted after the date of the
14 said McCune trust deed and the said case of Rucker *v.* Dooley, 49 Ill. 377, referred to by said supreme court as having established a limitation upon the time for taking out a deed on such a sale at twenty years was not decided until September, 1868, more than a month after the date and execution of said McCune trust deed. That at the date of said McCune trust deed the statute of 1845 was in force in the State of Illinois, and that by said statute there was no time limited within which the holder of a certificate of purchase must take out a deed.

And oratrix further shows that the law of the land as established by the decisions of the courts of last resort in the State of Illinois on the 13th day of August, 1868, was that the holder of a mortgage after condition broken was the real owner as against all the world, and that thereafter the mortgagor had only an equity of redemption

which was an equitable right, the creation of the courts of chancery, and that after a foreclosure or an effort to foreclose a mortgage by the mortgagee followed by possession of the premises the mortgagee's holding was considered adverse as to all the world and under the title derived by and through the mortgage the mortgagee held as under claim and color of title. That unless the mortgagor redeemed in accordance with the provisions of the decree or the statute that he lost his equity of redemption, and thereafter the mortgagee was the sole owner of both the legal title and the equity of redemption.

And oratrix respectfully shows that the laws of the land as established by legislative authority and the judicial decisions of the courts of last resort, as they exist at the date of a contract became a part of it, and cannot afterwards be changed so as to impair the obligation of that contract or materially infringe upon the legal remedies provided for its enforcement.

15 Your oratrix shows that the said statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, as the same has been construed by the decision of the supreme court of Illinois, as aforesaid, if the same are enforced against your oratrix, do or would impair the obligations of the contract of the said trust deed from the said Absalom McCune, to said Johnson as trustee for your oratrix, and has and will deprive your oratrix of her rights and remedies as they existed at the date of said contract contrary to the provisions of sec. 10, art. 1 of the Constitution of the United States of America, and contrary to section 14 of article 2 of the constitution of Illinois, and that there exists in this case a controversy necessarily involving the construction of the Constitution of the United States of America as applicable to the said statute of the State of Illinois, and the decisions of the supreme court of the State of Illinois.

And your oratrix further shows that the said statute of Illinois of 1872 as construed by the supreme court of Illinois, is not merely a limitation law, but is a law professing and attempting, as so construed, and as applied to this case, to deprive your oratrix of the vested right and title which she had on the 28th day of January 1881 (when the period of fifteen months after said master's sale had fully expired) and thence thereafterwards for five years after said 28th day of January, 1881, and to terminate and put an end to that right and title, and she submits and charges that the said act as so construed and applied by the supreme court of Illinois would deprive your oratrix of her said property without due process of law, contrary to sections 1 and 5 of article 14 of the Constitution of the United States, commonly known as the 14th amendment to said Constitution, and contrary to section 14 of article 2 of the constitution of Illinois, and in contravention of the law of the land; and that the matter in dispute exceeds *the* value, exclusive or interests and costs, the sum or value of two thousand dollars.

16 And oratrix further shows that after the order of reversal was entered in the supreme court of Illinois as above set forth, said cause came up for trial in the circuit court of Fulton county, which

court applying the said statute of 1872 as so construed by the said supreme court, and after the introduction of evidence showing substantially the facts hereinbefore set forth, directed the jury to find oratrix guilty and the defendant the owner of said lands in fee simple, and the jury was compelled so to find, and notwithstanding oratrix's motion for a new trial, judgment was entered in accordance therewith.

And oratrix respectfully submits that she has fully presented her defense at law, and that she is without remedy in this case, except in this court of equity. That it has been repeatedly decided by the Supreme Court of the United States, both in the several hearings of this case and in other cases, construing and applying the said statute of 1872 to deprive her of her said property and right, that she has no remedy in a court of law. Yet your oratrix maintains she is the equitable owner of the premises in controversy; that by his trust deed to E. G. Johnson, trustee, August 13th, 1868, Absalom McCune vested the legal title in said trustee and oratrix as the holder and owner of the notes described therein became the *cestui que trust*, and afterwards when the condition of the said trust deed was broken and oratrix reduced the property to possession she became the equitable owner; that she has protected her title by paying all taxes accruing thereon and by buying in the lands at the master's sale, and has maintained her possession, claim and ownership ever since, while the said McCune and his grantee, Prettyman, failed to redeem said lands according to the provisions of the decree of sale, made no claim to possession for more than twenty-years, and have witnessed the development and improvement of said property and its growth in value by the expenditures of large amounts of money
17 by your oratrix as aforesaid from a worthless swamp to a highly cultivated and valuable farm, without revealing their intention to claim ownership to both land and improvements. That in all the proceedings in the circuit court of Mason county by which oratrix sought to recover again the 520 acres of released land resulting in the foreclosure of the McCune mortgage, the sale of the land and its purchase by oratrix, she has done no act inconsistent with her equitable title, nor has she omitted at any time to assert her claim of ownership, nor has she suffered any decree or judgment of any court affecting her equitable title, yet by the laws of the State of Illinois as construed and enforced by its courts of last resort, after exhausting every effort and urging her defense three times before the supreme court of Illinois, the defendant is about to recover the possession of said lands and have his title thereto in fee simple established by a final judgment of a court of record, permanently clouding, if not wholly defeating oratrix' title thereto.

Oratrix further shows that the statutes of the State of Illinois provide that in all actions of ejectment the defeated party may have a new trial upon payment of the costs and making a motion therefor within one year after the date of the judgment. That in accordance with said statute oratrix paid the costs in the circuit court of Fulton county, and moved for a new trial within the

prescribed time and thereupon the judgment against oratrix in said court was set aside, and said cause stands for trial *denovo* at the present term of said court, which convened *to* the third Monday of this May, 1902, to-wit: May 19th, and is now in session. But oratrix will not be able at that trial to offer any other or different defense than that she has already presented, and under the decision of the supreme court of the State of Illinois, construing and applying the said act of 1872 to deprive her of her vested property and contract right, the result of such trial must necessarily be adverse to oratrix and result in a judgment from which
18 she could not obtain relief unless this court shall grant the relief herein prayed; and the defendant be enjoined from the further prosecution of said suit; and oratrix shows that said case in ejectment is liable to be called and tried forthwith and that your oratrix will be unduly prejudiced in her rights unless said temporary injunction as hereinafter prayed issue forthwith.

And your oratrix further shows that at the time she took possession of said lands in the summer of 1872 they were low, wet and swampy, and unfit for agricultural purposes, and used only for pasture and hay land during the driest part of the year. That such lands were valued at from $1.00 to $10.00 per acre, and these lands were not at that time worth to exceed $10.00 per acre. That said Benjamin S. Prettyman had become the owner of the equity of redemption by his deed from Absalom McCune prior to 1872. That he lived at Pekin within ten miles of said premises and was an intimate friend of Allison Breedlove, oratrix' tenant, and frequently visited at his house within two miles of said land and was acquainted with all that oratrix and her tenant were doing with reference to said property. That in conversation with said Breedlove he always spoke of the land as having been sold to oratrix and when reference was made to the price she had been compelled to pay for it he replied that she was able to redeem it from water and make it a good farm. That afterwards when John Coddington succeeded to the tenancy of the place he frequently met Mr. Prettyman at Pekin and in conversations in regard to the property he spoke of it as land he had once owned. That said Prettyman continued to live in Pekin until after the date of the conveyance to the defendant herein and during all that time was fully advised of what was being done with and upon said premises. And oratrix shows that after the said Coddington became tenant of said premises she commenced making improvements thereon in the way of fencing and draining, and between the
19 years Jan. 27, 1886, and July 15th, 1895, she built three dwelling houses, three large barns, three large corn cribs and other necessary farm buildings upon said premises at an expense of upwards of $5,000. That she also paid for drainage assessments upon said premises upwards of $5000. That she also paid for breaking the land which was a very expensive task on account of the strong growth of swamp grass and the peculiar nature of the ground, and for several years after the land was broken it was practically unproductive, being infested with wire worm, cut worm, and other pests. That the

soil was peculiar, being almost like peat, and highly inflammable, so that great pains had to be taken to avoid burning anything on the ground, and frequently fires would catch from unknown sources and have to be put out at great expense. That the soil was also deficient in some of the elements of normal farm land so that corn did not mature, and other crops could not be raised at all. That oratrix procured analysis of the soil, and applied various fertilizers to remedy its deficiencies; and about the time the said ejectment suits were commenced, she had overcome the difficulties and rendered the soil fertile and profitable. But oratrix shows that by reason of the said difficulties and expenses she had derived no income from said lands, but had spent large sums of money upon them. And further shows that as a result of her said efforts, the land was converted from a worthless swamp to good farm land worth in the open market $65.00 per acre. And oratrix charges that said Prettyman had full knowledge of all these facts, and yet at no time did he assert any claim of ownership to the property, or notify oratrix or her agents that he had any claim to the same, but stood by and allowed oratrix to spend said sums of money for the improvement and betterment of said premises. Wherefore oratrix shows that it would be highly inequitable and unjust to permit the defendant as the voluntary grantee of said Prettyman, without valuable consideration, to assert his title to said premises as against oratrix, and that he is equitably estopped from doing so; and in this respect oratrix has no remedy in a court of law, but can only secure relief by means of the equitable powers of this court.

In consideration whereof, and forasmuch as your oratrix is without remedy in the premises by the strict rule of law and can only have relief in a court of equity where such matters are properly cognizable, and to the end that said H. W. Lightcap, who is made a party defendant to this bill, may be required to make full, true and direct answer to the same, but not upon oath, his oath being specifically waived, and that said H. W. Lightcap be required by the decree of this honorable court to convey to your oratrix by sufficient deed, all his right, title, interest claim and demand in and to said lands; and that said H. W. Lightcap be permanently enjoined from asserting ownership of said lands, from entering thereupon or taking possession thereof, or dispossessing your oratrix thereof, or denying the title of your oratrix thereto; and alternatively that said H. W. Lightcap may be permanently enjoined from further prosecuting said action of ejectment in the circuit court of Fulton county aforesaid, or any other court, and that by the order and decree of this court, the deed of said Benjamin S. Prettyman to said H. W. Lightcap may be ordered to be given up and surrendered for cancellation, and your oratrix prays that said last mentioned deed be declared to be a cloud upon the title of your oratrix, and that your oratrix' rights in the premises as above set forth, may be declared, confirmed and established by the order and decree of this court and that your oratrix may by the order and decree of this

court be confirmed in her possession and occupancy of said premises against said H. W. Lightcap, and to the end that pending the hearing of this petition and until the matters and things herein alleged can be established and proved before this honorable court, a preliminary injunction may be issued against the defendant H. W. Lightcap, enjoining him from prosecuting the said action of ejectment in the Fulton county circuit court, or any other court,
21 until the final order and judgment of this court herein; and that your oratrix may have such other and further or different relief as to your honors shall seem meet, and to equity shall appertain.

May it please your honors to grant to your oratrix the writ of summons in chancery directed to the sheriff of said county of Cook, commanding him that he summon the defendant, said H. W. Lightcap, to appear before this court on the first day of the next September term thereof, to be held at the court house in Lewistown in the county of Fulton aforesaid, and then and there full, true, direct and perfect answer make (but not under oath) to all and singular the matters and things hereinbefore alleged and set forth, and to stand to abide by and perform such order, direction and decree as may be made against him in the premises, and as shall seem meet and agreeable to equity.

And your oratrix also prays that a writ of temporary injunction issue out of and under the seal of this court, as aforesaid, directed to said defendant, and enjoining and restraining the said defendant, his attorneys, representatives and agents, from prosecuting or further prosecuting the said action of ejectment in the circuit court of Fulton county, Illinois, until the further order of this court.

And your oratrix will ever pray, etc.

CHIPERFIELD & CHIPERFIELD,
W. W. HAMMOND,
Solicitors for Plaintiff.

22 EXHIBIT A.

Mason County Circuit Court, to the March Term, A. D. 1872.

LYDIA BRADLEY CLARKE *vs.* BENJAMIN S. PRETTYMAN, Thomas B. Breedlove, Absalom McCune.	In Chancery for Relief, and to Set Aside Conveyance, Reinstate Mortgage or Trust Deed, and for Foreclosure.

To the Honorable Charles Turner, judge of the twenty-first judicial circuit of the State of Illinois:

The complaint of your oratrix Lydia Bradley Clarke, of the city and county of Peoria and State of Illinois, respectfully represents and states that on or about the fifth day of May, A. D. 1867, her late hus-

band, Tobias S. Bradley, late of Peoria county aforesaid deceased, at said Peoria intestate leaving no last will and testament and leaving no children issues of her said marriage with the said Tobias S. Bradley or otherwise; and that after his decease she was duly appointed sole administratrix of the goods, chattels, property and estate which belonged to the said Bradley at his decease, and she is still acting in that capacity.

Your oratrix further states that as such administratrix she has fully paid and satisfied all claims and demands proven or outstanding against said estate and that more than four years have elapsed since she was appointed administratrix as aforesaid.

Your oratrix further states that she is informed and believes the law of the State of Illinois to be that she as the widow of the said Bradley deceased, was and is entitled to and is the lawful owner in her own right of all the personal estate of the said Tobias S. Bradley deceased remaining unexpended after the payment of debts as aforesaid and that afterwards to wit: after her said appointment as said administratrix as aforesaid, on or about the
23 thirty-first day of December A. D. 1869, she intermarried with one Edward E. Clark of the city of Memphis in the State of Tennessee and yet remains his wife, but that since her intermarriage she has continued to live and reside at the homestead in Peoria aforesaid, and that the said Clark has hitherto continued to live and reside in the city of Memphis aforesaid.

Your oratrix further states unto your honor that on or about the third day of *M*une A. D. 1867, one Thomas B. Breedlove, then residing in the county of Mason, in the State of Illinois, was indebted to your oratrix, then Lydia Bradley in the sum of nineteen thousand six hundred and sixteen dollars and twenty-five cents as specified and shown in five promissory notes of that date signed by the said Breedlove and payable to the order of said Lydia Bradley with interest from date at ten per cent. payable annually at the First National Bank of Peoria in the State of Illinois, each note for the sum of thirty-nine hundred and twenty-three and 45/100 dollars and payable in one, two, three, four and five years respectively, and the said Breedlove being then the owner in fee of the following described lands and real estate situated in the county of Mason aforesaid, viz: the northeast quarter of section twenty-two in township twenty-three north and range six west of the third principal meridian, also the east half of the southeast quarter of the same section (22); also the south half of section twenty-three in the same township and range aforesaid; also the east half of section twenty-six and the southwest quarter of the same section in the same township and range above named; also the northwest quarter of section twenty-six above named of great value to-wit, of more than the amount of said indebtedness described in said notes—in order to secure the payment of all said indebtedness according to the tenor and effect of the notes above described together with his wife Eliza Breedlove, made, exe-
24 cuted and delivered their deed of conveyance under their hands and seals and by them duly acknowledged, commonly called a

trust deed and being in equity and law a mortgage—of the lands above herein described to one Elbridge G. Johnson, conditioned among other things for the payment of said described notes, which said — being acknowledged by the said Breedlove and wife was also duly recorded in the recorder's office of said Mason county, a copy of which said deed is hereto attached marked "A" and made a part hereof, and your oratrix will ask leave on the trial of this cause to produce and offer in evidence a certified copy thereof together with a like copy of the certificates of acknowledgment and record if unable to find the original for that purpose and to produce the original if found.

And your oratrix further states unto your honor that afterwards and on or about the eighth day of October A. D. 1867, the said Thomas B. Breedlove and Eliza, his wife, by their other deed of that date under their hands and seals and by them duly acknowledged pretended to convey to one Benjamin S. Prettyman of the county of Tazewell and State of Illinois the said lands described as conveyed and mentioned in the trust deed to your oratrix aforesaid in said deed to said Prettyman described as follows, viz: the east half of the southeast quarter of section twenty-two, the south half of section twenty-three and all of section twenty-six, all in township twenty-three north of range six west of the third principal meridian containing twelve hundred acres, more or less, which conveyance was made subject to the trust deed or mortgage above described and said conveyance recites a pretended consideration of twenty-four thousand dollars which your oratrix is informed and believes included the payment of the said incumbrance to your oratrix by the said Prettyman at the time assuming or agreeing to pay off the said incumbrance to your oratrix above described. A certified copy
25 of said deed is hereto attached marked "B" and made a part hereof for the purpose of showing the contents thereof and your oratrix will ask leave on the trial of this cause to refer to and use in evidence for the purpose aforesaid the said certified copy if deemed material, the original not being in the possession or control of your oratrix.

And your oratrix further states and shows unto your honor that the said Benjamin S. Prettyman on the thirteenth day of August A. D. 1868, for purposes hereinafter mentioned made or pretended to make a sale and conveyance of part of said lands described in said Breedlove's deed to him for the pretended consideration or sum of twenty-four thousand dollars and to that end the said Prettyman and Sarah A., his wife, under their hands and seals, being dated on the day and year last above mentioned, executed a deed which was by them acknowledged to one Absalom McCune, thereby conveying to him the northeast quarter of section twenty-two, the north half of the east half of the southeast quarter of the said section twenty-two, the south half of section twenty-three, and the north half of the north half of section twenty-six, all in township twenty-three north of range six east of the third principal meridian part of lands above described as conveyed by said Breedlove to the said Pretty-

man and subject to the incumbrance or trust deed for the security of the debt to your oratrix aforesaid, a copy of which deed is hereto attached marked "G" and made part hereof for the purpose of stating and showing the contents of said conveyance and your oratrix will ask leave on the trial of this cause to refer to the said deed or a certified copy thereof if the original can not be obtained if deemed material by your orator and oratrix. And your orator and oratrix further state to your honor that the said deed purports to have been filed for record in the recorder's office of Mason county on the fifteenth day of August, A. D. 1868, at six of the clock p. m. and to have been recorded in said office,
26 and your orator and oratrix further show unto your honor that the said Absalom McCune on the same day and year aforesaid executed a mortgage, commonly called a sale mortgage, of the same premises so conveyed or pretended to be conveyed by said Prettyman to him to the said Prettyman conditioned for the payment to said Prettyman of the sum of eight thousand dollars specified in two notes of even date with the said mortgage payable to the order of the said Prettyman, one for the sum of three thousand dollars payable on the first day of June A. D. 1859 and the other of five thousand dollars payable on the thirteenth day of August A. D. 1872 with interest as specified in said notes, which mortgage deed purports to have been filed in the recorder's office of said Mason county on the fifteenth day of August A. D. 1868 at ten o'clock and forty minutes in the forenoon, a copy of which mortgage deed and certificate of record and acknowledgment *are* hereto attached marked "D" and made part hereof for the purpose of stating and showing the contents thereof, and your orator and oratrix will ask leave on the trial of this cause to refer to the original or a certified copy thereof if the original cannot be had if deemed material.

And your orator and oratrix further state and show unto your honor that on the same day of record, to-wit, on the thirteenth day of August A. D. 1868, the said Prettyman received from the said Absalom McCune another mortgage or trust deed that was drawn up or made by the said Prettyman, and is in his handwriting wherever not in printed characters and purports to be and was to E. G. Johnson aforesaid in trust and conditioned for the payment to your oratrix then Lydia Bradley of the sum of fifteen thousand dollars specified in three notes of five thousand dollars each of the same date aforesaid, payable to the order of Lydia Bradley, in one, two and three years after date at ten per cent. signed by said Absalom McCune, which deed was duly ac-
27 knowledged by said McCune and said deed was left by said Prettyman for record in the recorder's office of said Mason county on the said fifteenth day of August A. D. 1868, at ten o'clock and thirty-five minutes in the forenoon, a copy of which deed marked "D" and notes *are* hereto attached and made part of this bill for statement of contents, and your orator and oratrix will ask leave to

refer to the same and offer them in evidence on the trial of this cause.

Your oratrix further states and shows unto your honor that after the making and delivery of last mentioned deed to said Prettyman he the said Prettyman with purpose and intent to wrong, cheat and defraud your oratrix out of her security upon the twelve hundred acres of land contained and described in the mortgage or trust deed from said Breedlove to the said Johnson for the security of your oratrix and to obtain from your oratrix the notes of Breedlove mentioned in said trust deed of said Breedlove to the said Johnson, said notes being then unpaid and still in the hands of your oratrix and the sum thereupon due including interest thereon amounting to about twenty thousand dollars, and being well and abundantly secured upon twelve hundred acres of land, and fraudulently and craftily intending to obtain from your oratrix the said notes without payment of the same and thus release himself and the said Breedlove from his obligation and liability to pay the same and to release said twelve hundred acres of land or the best and most valuable part thereof from the burden of said security proposed to your oratrix and her agents to take and receive the said mortgage deed and notes of the said McCune for fifteen thousand dollars before described in lieu of the mortgage and notes of Breedlove upon the twelve hundred acres, and give up to him, the said Prettyman, the said Breedlove notes and release the said trust deed of said Breedlove to said Johnson, and that he, the said Prettyman would pay the balance then due upon said Breedlove's
28 notes, over and above the said fifteen thousand dollars and with intent to mislead, cheat, and defraud your oratrix in the premises, the said Prettyman fraudulently and untruthfully and falsely represented and stated to your oratrix and her agents particularly to one Washington Cockle who was then the business agent of your oratrix and had in his charge and custody the said mortgage security and notes of said Breedlove, that the six hundred and eighty acres of land contained in and described in the deed from said McCune to said Johnson before mentioned were the most valuable part of the said twelve hundred acres or as valuable as any part thereof contained in said Breedlove's mortgage or trust deed, or that said lands were in quality as good or better than the quality *as* the balance of said lands, that they were worth thirty thousand dollars and were good security and that they were valuable, improved and cultivated land, when in truth and fact the said lands described in said mortgage or trust deed of said McCune to said Johnson as trustee aforesaid were so selected by the said Prettyman from the twelve hundred acres as to include the poorest, least valuable and unimproved of said twelve hundred acres, leaving all the best, most valuable in quality and best located and best improved of the said twelve hundred acres contained in the Breedlove mortgage in the hands or possession of the said Prettyman, and the said lands so included in said McCune deed to said Johnson were wet, low, swampy, unimproved and com-

paratively valueless lands, subject to overflow and unfit for agricultural purposes and not worth more than one-third to one-half the said mortgage debt in said deed described, and all this well known to said Prettyman.

And your oratrix further states and charges that the said Prettyman at the time of making said proposition and representations was well acquainted with the location, position, quality and value and character of said lands as well as the whole of the said
29 twelve hundred acres, that he well knew said lands so contained in said McCune deed were wet, low swampy lands subject to overflow of water, unfir for agricultural purposes and not worth in the aggregate more than half the amount of the said sum of fifteen thousand dollars.

Your orator and oratrix further state and charge that neither your oratrix or her agents had ever been upon or seen said lands nor were they acquainted with their qual-ity, relative location, quality, value or condition, and this the said Prettyman well knew.

And your oratrix further states that she, your oratrix and her agent the said Cockle, not knowing the quality value, location, character or condition of said lands and relying in that respect solely upon the false, fraudulent, untruthful and fraudulent representations of the said Prettyman, and upon his further representation and statement at the time made that said McCune was a large stock farmer and was a man of property and good and responsible for the amount of said notes, and being deceived, misled, and deluded by the said wrong, false, fraudulent, untruthful representations of the said Prettyman about the value of said lands, and said Prettyman knowing it, were induced, persuaded to and did execute a release of the said Breedlove mortgage or trust deed aforesaid and did deliver up to said Prettyman the said Breedlove notes and did accept and receive the said McCune mortgage or trust deed and the notes therein described at their nominal or face value, to-wit of fifteen thousand dollars, the said Prettyman paying to the agent of your oratrix the balance of the said Breedlove notes, to-wit, about the sum of five thousand dollars, and upon the further and within guarantee of said Prettyman that there was no other incumbrance upon the lands described in said McCune trust deed or mortgage
30 previous to the incumbrance of said deed. And your orator and oratrix attach hereto and make part hereof for the purpose of stating its contents the said release of said Breedlove trust deed marked "E" and will ask leave to refer to the original and the certificate of acknowledgement thereon on the trial of this cause if the same can be found. And in default of being able to procure the same your orator and oratrix will ask leave to offer and refer to a certified copy of the same from the recorder's office of said Mason county.

And your oratrix further show- and charge- that the said McCune never took possession or occupied or assumed to possess, occupy or control said farm, that he was and is now a citizen of the State of Illinois, was not a man of plentiful means, was not a farmer or stock

farmer, and your oratrix believes the fact to be and so charges that the said McCune never in fact was or intended to become the lawful purchaser or owner of said premises so pretended to be sold and conveyed to him by the said Prettyman, that he was not possessed of sufficient or visible means from or of which said debt could be made or any part of it, and that he was in fact used by the said Prettyman as a stool pigeon, cat's paw or decoy duck or tool for the purpose of procuring the discharge aforesaid, and that after the discharge aforesaid and the delivery of the said Breedlove notes to said Prettyman, the said McCune on or about the thirtieth (30th) day of November A. D. 1868, together with his wife Rahoma McCune by their deed under their hands and seals of that date and duly acknowledged and recorded, conveyed the said premises to the said Prettyman, or reconveying the said premises or lands contained in the said mortgage or trust deed of said McCune hereinbefore described as delivered by said Prettyman to your oratrix, a copy of which deed is hereunto attached and made part hereof marked
"F" for statement of its contents, and your orator and oratrix
31 will ask leave to refer to and read a certified copy thereof
in evidence on the trial of this cause if the original be not produced by the said Prettyman on said trial.

Your orator and oratrix further state and show that the said McCune since said deed has been absent from this State and in parts unknown to your orator and oratrix, and that he, the said McCune did not pay and has not paid the taxes legally assessed upon the land so conveyed to him by said Prettyman and the same has not been paid by said Prettyman and your oratrix has been compelled to pay the same to save said lands from being lost and will be compelled to pay other and further and larger sums for the same purpose and that the pretended sale by said Prettyman to said McCune has been canceled and revoked by reconveyance by said parties and that the said twelve hundred acres of land contained and described in said trust deed of said Breedlove to the said Johnson for the security of the notes to your oratrix before described and the title thereof *is* now vested in the said Prettyman that he is the sole holder and owner thereof subject only to the said trust deed from the said McCune given for the security of the said fifteen thousand dollars mentioned therein, that altogether the said twelve hundred acres is worth much more than the said original debt of the said Breedlove to your oratrix and the interest thereon, and whatever sum the said Prettyman may have paid the said Breedlove for his conveyance aforesaid, if in fact the said Prettyman paid the said Breedlove any other consideration for said lands than the amount of the incumbrance and debt thereon due your oratrix as hereinbefore described, or if the said Prettyman in fact paid to said Breedlove the amount of the consideration stated in said deed from said Breedlove to him inclusive of the sum due your oratrix and secured on the lands described in said trust deed of said Breedlove.

Your oratrix further states and shows unto your honor that
32 they made repeated attempts to find said McCune and in default thereof and in default of payment by him of said indebtedness or the interest thereon described in said deed of said McCune to said Johnson to secure said notes due your oratrix as they fell due and in default of payment of *ta-es* upon said premises your oratrix caused said lands to be advertised to be sold according to the tenor and effect of power of said T. deed but before said sale being advised thereto your oratrix had the said lands visited and examined by the business agent of your oratrix which was the first time your oratrix or her agent or agents had ever been upon or seen said lands described in said McCune trust deed. When your oratrix found on such examination that the said lands were low, wet and swampy and of very little value, that such sale would not if made for the full value of said lands pay nearly the amount of the fifteen thousand dollars and the interest thereon together with the expenses of the sale and taxes unpaid upon said lands that it was not advisable to proceed to sell the same, no recourse being possible upon said McCune who could not be found and who had no known property or means from which the balance of said debt could be made and your oratrix further show- and charge- that the parcels of land so included in said mortgage or trust deed of said McCune to said Johnson had been so craftily and cunningly selected by said Prettyman from the said twelve hundred acres described in the said deed of said Breedlove to said Johnson for your oratrix before described that they include all the poor, wet, swampy and inferior and worthless land of said twelve hundred acres and left retained by the said Prettyman all or nearly all that part of said twelve hundred acres which is really valuable for agricultural or farming purposes. And it then first became known unto your oratrix and her agents that your oratrix had been misled, cheated and defrauded in the premises and cheated
33 and defrauded out of her just dues and securities by the fraudulent acts of said Prettyman, your oratrix therefore further states and charges that the said release of the said Breedlove mortgage was obtained by the said Prettyman by false, fraudulent, corrupt and dishonest statements, pretensions and representations as to the value and quality and security of the said lands included in said McCune trust deed, and as to the condition, responsibility and pecuniary ability of the said McCune made by the said Prettyman to your oratrix and her agents that the said release was so obtained and the notes of said Breedlove promised to be given up to said Prettyman by said Prettyman solely for his advantage and benefit, and that he knowingly and intentionally misled and cheated your oratrix and her agents in the premises, that the debt of said Breedlove was well secured, that large arrears of interest have fallen due on the same and several of the notes described in the said Breedlove deed are also unpaid and taxes unpaid upon the premises described in said deed, and that your oratrix has the right to have the whole balance of the debt now paid whether due or not due according to the original terms of the con-

tract, and that the said release and discharge was, is and ought to be deemed and held null and void and of no effect and ought to be so decided and declared and cancelled and annulled; that the said Prettyman ought to be ordered and compelled to return and restore to your oratrix the mortgage lien she had and held upon the twelve hundred acres of land described in said Breedlove deed to said Johnson for your oratrix and to the other notes in said deed described, subject however to the deductions of the amount paid by the said Prettyman upon the said indebtedness of said Breedlove and that your oratrix ought in equity and good conscience to have a decree that the said release be cancelled, annulled and treated as never made, that the said Prettyman restore to your oratrix the
34 said notes of said Breedlove so delivered to the said Prettyman, that the said mortgage or trust deed be declared in force and a valid lien upon the premises therein described until the *dull* amount thereof due of principal and interest shall be paid by the said Prettyman, that for the non-payment of interest and principal and taxes as provided in said trust deed the whole balance of said debt *to* be declared to be due for the foreclosure of the said Breedlove mortgage or trust deed and for the sale of the said twelve hundred acres of land therein described or so much thereof as will be sufficient to pay the balance of the said Breedlove debt and interest thereon unless the said sum shall together with all cost be paid by the said Prettyman together with all the cost of this proceeding and all disbursements made by your oratrix for taxes upon said premises described in said McCune deed or which may hereafter be paid by your oratrix to save the said premises or any of them *prior* sale for taxes either past or in future until the said debt shall be paid in full, and that upon such payment being fully made either by sale or by payment by said Prettyman, your oratrix be ordered to deliver up *deliver up* or cancel, the said mortgage or trust deed of the said McCune or the notes there described. And your orator and oratrix

And hoped that said Prettyman having now the possession of the whole of said premises would *of* paid or would have offered to or paid said debt in full and thus restored your oratrix to her rights in the premises, but the said defendant Prettyman has ever neglected and refused so to do, but gives out in speeches and pretends that he is not liable or responsible to your oratrix and that she must follow the said McCune and that she your oratrix has no recourse upon him.

And your orator and oratrix being without remedy at law
35 in the premises therefore prays that the said Benjamin S. Prettyman, Thomas B. Breedlove and Absalom McCune be made parties defendant to this suit, and that they be summoned to appear and answer to the foregoing bill and all the matters and things, charged and allegations therein mentioned as fully and positively as if therein specially interrogated, but not upon their respective oaths, their oaths being waived to such answer that upon a final hearing hereof an account may be taken of the amount due

upon the said Breedlove debt herein described, including interest thereon and deducting the amount paid upon the same by the said Prettyman, also of all taxes paid or hereafter to be paid by your orator and oratrix up to the date of said — and that the said release be declared null and void and cancelled, that the said Prettyman be ordered to produce at said trial the said notes of the said Breedlove or account for their loss, that the contents thereof be proven; and that the said Prettyman be ordered to produce on said trial the original trust deed of said Breedlove herein described and the original lease herein mentioned and the original deeds herein described from said Prettyman and wife to said McCune; and from said McCune and wife to said Prettyman, and that said mortgage or trust deed of said Breedlove to said Johnson for your oratrix herein described be declared and decreed a first lien and mortgage lien upon the said twelve (12) hundred acres of land therein described for the security of principal and interest thereupon due and for the taxes paid by your oratrix for the lands or any part of them in said deed described and that the whole be declared due and payable according to the tenor and effect of said deed, and that the usual decree be made for the sale of said mortgaged premises and for the payment of the amount for principal and interest and taxes aforesaid and costs of this suit by some short day to be fixed by said court, and in default thereof that said premises or so much thereof as may
36 be necessary for the purposes aforesaid be sold by the master in chancery of this court according to the practice of courts of equity in such cases; and that the said defendants and each of them and that all persons claiming under them or either of them subsequent to the commencement of this suit and all other persons not parties to this suit who have any liens by judgment or decree upon the mortgaged premises subsequent to the said trust deed of the said Breedlove or any liens or claims thereon by or under any such subsequent decree or judgment, either purchasers, incumbrances, or otherwise may be barred and foreclosed of all equity of redemption in said premises, and that your orator and oratrix may have such other and further relief as the nature of the case may require and as to this court shall seem agreeable to equity and good conscience *as* your complainant as in duty bound will ever pray.

LYDIA BRADLEY CLARKE,
By E. G. JOHNSON, *Her Solicitor.*

E. G. JOHNSON,
Solicitor for Complainants.

37 STATE OF ILLINOIS, } ss:
County of Mason, }

Of the March Term, 1872, of the Circuit Court of said County.

LYDIA BRADLEY
vs.
BENJAMIN S. PRETTYMAN, THOMAS B. Breedlove, & Absalom McCune. } In Chancery to Foreclose.

The Separate Answer of the said Benjamin S. Prettyman, One of the Above Named Defendants.

Saving and reserving &c., for answer to said bill of complaint in said cause above named filed & to so much thereof as he is informed that it is necessary & proper for him to make answer unto severally answering says—He admits that said Tobias S. Bradley died as alleged without children and that said complainant was appointed administratrix as alleged in said bill, but respondent knows nothing of the payment of the debts of the estate of Bradley, and therefore denies the same is true & respondent admits that by law said complainant is entitled to the personal estate of said Tobias S. Bradley. Respondent admits the marriage of complainant as alleged, but known not of the residence alleged, & therefore denies the same and calls for proof. This respondent admits that said Thomas B. Breedlove on the 3rd day of June, 1867, was indebted to said Lydia Bradley $19616.25/100 dollars as shown in said alleged notes of that date payable to Lydia Bradley with interest at 10 per cent. & payable as alleged. And this respondent admits that said Breedlove owned & executed the trust deed or mortgage on the lands in said bill alleged to secure the payment of said notes and sum of $19616.25.

And the respondent admits that said Breedlove & wife on the 8th day of October 1867, sold and conveyed the said lands in said mortgage and bill described to this respondent and that said deed was made to this respondent subject to said mortgage to said Johnson,
and this respondent avers that said consideration *was*
38 $24000.00 named in said deed was not pretended but real,
and this respondent denies that he ever agreed to pay off said incumbrance to complainant or otherwise.

This respondent admits that on the 13th day of August 1868, he sold and conveyed the part of said lands alleged in said bill & described in his deed to Absalom McCune to said Absalom McCune for the sum alleged & that the same was acknowledged and recorded as alleged in said bill, but he denies it was for the purpose or with the intention in said bill alleged, or made subject to any incumbrance or trust deed to, or any debt to complainant, and this respondent admits that said Absalom McCune on the 13th day of August, 1868, executed to this respondent for said sum of $8000.00

dollars, a sale mortgage on said land named in said deed to him & that said mortgage was filed for record as alleged, & respondent admits that on the 13th day of August 1868, said McCune executed his trust deed or sale mortgage to said E. G. Johnson to secure the sum of $15000.00 *dollars* to said complainant Lydia Bradley in notes described in said bill, and respondent admits that the same — acknowledged and was received at the time alleged.

But this respondent denies that he, after the making of said deed or mortgage named or at any time with any intent to cheat or defraud complainant out of any security or otherwise or to obtain the notes of the said Breedlove unfairly or unlawfully or fraudulently or craftily or otherwise improperly from said complainant or otherwise or to improperly or wrongfully to release said Breedlove or this respondent from any agreement or obligation whatever or wrongfully release all or any part of said land from said mortgage of said Breedlove proposed to complainant or her agents to take the notes of McCune for $15000.00 in lieu of the said notes & mortgage of said Breedlove & get said release deed named, although this re-
39 spondent avers that he did before the making of said mortgage from said McCune to said Johnson for $15000.00 *dollars* named call on the agents of complainants Washington Cockle & the said trustee E. G. Johnson to inquire whether they or complainant would accept the notes and mortgage of said McCune on 600 acres of the land in the Breedlove trust deed or mortgage to said Johnson named in lieu of so much of the debt of said Breedlove to said complainant inasmuch as the same was to become due faster & earlier than the Breedlove debt, said notes of McCune becoming due in one, two & three years from August 13th, 1868, and the said Breedlove debt not being due until 1, 2, 3, 4, & 5 years from June 30, 1867, and this respondent was then informed by said Johnson that the whole matter was left by complainant with said Cockle by him to be determined for her as he thought best under the circumstances and this respondent avers that he then called on said Cockle, who informed this respondent, that if this respondent *was* pay him for said complainant the residue of the debt of Thomas B. Breedlove to complainant over and above said $15000.00 *dollars*, he would take the said notes and mortgage of said McCune on said 600 acres of said land in lieu of that sum of $15000.00 *dollars* of the Breedlove debt & have the mortgage or trust deed on all of the 1200 acre tract released and satisfied & this respondent avers that he then agreed to & with the said Cockle for and on behalf of complainant to pay in cash the residue of the Breedlove debt and have the said McCune execute his note and mortgage to said complainant or for her use on said 600 acres of land & then & there paid to said Cockle in cash the residue of said T. B. Breedlove debt over said $15000.00 *dollars* and by his, said Cockle's, direction took the notes and mortgages of McCune to the office of said E. G. Johnson who then and there in the presence of this respondent carefully examined the
40 same and the receipt from said Cockle for the residue of said debt of Breedlove, paid in cash by this respondent. (being as

this respondent now recollects over $7000.00 *dollars* in cash), and he, the said Johnson then remarked that he, Johnson would not have agreed to exchange said security & satisfy said trust deed of Breedlove, but as complainant & Cockle had chosen to do so, he would, as directed by them, receive the notes and mortgage of McCune for complainant & release the Breedlove deed of trust on all of the lands therein, conditioned that this respondent would guarantee *that* the title to said 600 acres in the mortgage of McCune to be free from any prior liens or incumbrances thereon & respondent avers that he then and there so guaranteed the same and delivered said notes and mortgage of said McCune to said Johnson for complainant & at the request of the said Johnson & for complainant caused the said mortgage of McCune to said Johnson for said 600 acres of land to be filed for record at the time in said bill alleged & he avers that there was then no prior or other lien on said land so mortgaged by said McCune & this respondent avers that the said Johnson notwithstanding said guarantee aforesaid would not & did not then execute said release, but said he would have said complainant herself to sign the same with him, as she was a woman & with all very careful & particular & personally looked over all her own business. And respondent avers that said release named in said bill was *of was* afterwards & to-wit and long after the date of said release in said bill named sent & delivered to your respondent signed & acknowledged as set forth in said bill and long after the said complainant & all of her agents had had full opportunity to examine said land, inquire into the character & standing of said McCune & in fact long after they had to some extent inquired of & become satisfied as to both and this respondent denies all intent or purpose to mislead, cheat, wrong, or defraud complainant or any other person in said transaction and this respondent denies all fraudulent, un-
41 truthful and false statements imputed to him in said bill and respondent denies that he represented *that* said 600 acres of land to be the most valuable part thereof, but thinks now it is of equal value with the residue thereof, and respondent denies that he informed any person that the same was cultivated land, although he avers that in fact part of the same was then & now is in cultivation & much more might then have been cultivated & all of the rest might now be put in cultivation & respondent denies that said 600 acres so mortgaged by McCune was the poorest and least valuable of the 1200 acres & respondent denies that said land mortgaged by McCune *were* subject to overflow or unfit for agricultural purposes or not worth more than ⅓ to ½ of said mortgage debt named or that — of it was ever wet or low or swampy or was so known by Prettyman & this respondent denies any further or other knowledge of the land or any part of it then was presumed to be & might have been known to said complainant & her agents & which the said Cockle averred that he did know the quantity & value of the same when respondent paid him the cash above named.

And respondent denies that complainant relied on anything he said in arranging said Breedlove debt but required written

guarantee from him for every thing doubtful & delayed the execution of every paper until time could be had to inform herself or for some similar purpose, this respondent denies that he represented said McCune to be a large stock farmer, but avers that he said that McCune claimed that he was buying the tract for a stock farm & that he represented that he then had a drove of Texas cattle coming from the south-west & which he expected to drive to & herd the same upon said land & had the appearance of being a fair business man; but he denies that he deceived, misled or deluded said complainant or her agents or that he was or is capable of doing so & avers that said Cockle is & was then the president or some important officer in the First National Bank of Peoria & said
42 Johnson is one of the most able lawyers in Illinois & said complainant has the reputation of being the most capable & efficient woman of business in the State of Illinois, and he positively denies that he ever persuaded or otherwise than in a just & fair business manner induced any of them to sign the release or consent that it should be done.

Respondent admits that he took up the Breedlove notes, but avers he paid for them before they became due as aforesaid & that — alon*g* induced complainant & her agents to take the money & the McCune notes & mortgage & give him the others. Respondent also admits that complainant accepted said McCune notes & mortgage & avers it was with full knowledge & when she had held them from the 13th to the 28th of August to examine, enquire & determine upon & about. Respondent denies that said McCune ever occupied or assumed to possess or occupy or control said farm, avers that he did employ persons to fence, break, erect a dwelling, cut hay & drain thereon for him & until his arrival with his cattle & procured tools, lumber & provisions for the persons aforesaid, that he does not know whether said McCune was a citizen of Illinois or not & never averred that he knew, & as to his means, this respondent had no other knowledge than his appearance & representations & that of those who introduced him & recommended him to respondent as a person wishing to purchase said farm, & those persons were persons known to respondent to be men of good character and means & who had shown said land to said McCune before he came to purchase the same of respondent and this respondent don't personally know said McCune was a farmer or a stock farmer, & denies he ever represented he did, but he avers that said McCune was represented to him as a stock farmer, feeder and dealer, & so represented himself to be & had the appearance of being such a person; respondent don't know the intentions of McCune, but avers he represented to this respondent that he intended improving said
43 land thoroughly and did buy material to do it, as this respondent knows & respondent knows the sale was not pretended but in good faith on his part and for all he knows on the part of the said McCune that those pretending to know represented to him that he, McCune, was the owner of 600 head of cattle then coming across the

States of Kansas & Missouri to said farm. Respondent denies any use of said McCune improperly as alleged or otherwise.

This respondent admits that about the 30th day of Nov., 1868, said McCune sold and conveyed said land to this respondent and this respondent avers that the following are the causes and circumstances under which said sale to him from McCune was made, the same McCune after making the proposition to improve said land aforesaid left as respondent was informed by him & others to hurry on his drove of cattle & on or about the last of September or in October of 1868, said McCune returned to Pekin & informed this respondent that he could not get his drove of cattle through the State of Missouri on account of the hostility of the inhabitants or the passage of some laws forbidding Texas cattle going through the State & therefore he was compelled to turn back said drove & could not get them through to Illinois that fall, but would get his farm ready & his business arranged for such business another year, & the agitation of the cattle fever or Texas fever question reaching Illinois owners of lands, said McCune became disheartened in his business & offered to sell his farm which he deemed very valuable to this respondent & to others; and respondent after the sale of said farm to said McCune having been offered a large sum, viz. $3000.00 *doll's* over what said McCune had paid him, he, respondent, enquired carefully of the standing & ability to pay of the party offering the same to him & was informed that he was a farmer residing in Peoria county, Illinois, responsible for his offer &
44 said McCune having again offered his farm to this respondent for the notes from him to this respondent & $1000.00 *dollars* advance on said original sale to him, respondent avers he agreed then & there to take the said farm & said McCune procured his wife to execute with himself the deed to respondent for said 600 acres of land in the bill named & respondent gave his note at twelve months' time to said McCune for $1000.00 & 10 per cent. interest and respondent avers that afterwards said McCune assigned said note to complainant to whom this respondent afterwards paid all of the same then due with the interest amounting to $1000.00 & over, having before paid $200.00 *dollars* on said note to one Allison Breedlove.

This respondent avers that he is the sole owner & holder of said 1200 acres of land subject to the mortgage *to* McCune to complainant, but respondent admits said 1200 acres is worth much more than the original debt of Breedlove & avers he paid said Breedlove in purchasing the same of him *b*ear $4000.00 *dollars* above any lien of said mortgage of Breedlove to complainant & thought he made a very reasonable purchase.

Respondent denies that said land in said mortgage from McCune to Johnson for complainant includes all the poor, wet, swampy & inferior & worthless land & complainant and her counsel either don't know what the facts are *of* which they have stated in their bill or if they do know, they have willfully misstated them in making those allegations, and respondent denies that said release was ob-

tained by false, fraudulent, corrupt or dishonest statements, pretenses or misrepresentations as to value, quality or security although he avers that 600 acres was only intended to be mortgaged and he avers he represented it to be 600 acres only & the fact was by mistake one 80 acre tract got in said mortgage & was not discovered until afterwards, & it now appears to be 680 acres & 600 acres alone was
45 ever agreed to be given as security & the other 80 the complainant has no equitable right to a mortgage upon whatever & one of the reasons for taking the purchase back from McCune was the discovery by respondent that he had — by mistake and accident in drawing up the papers 680 acres into said deed to McCune when he had in fact sold him but 600, but the 80 acres being included in said mortgage of McCune for complainant is no cause of complaint to complainant & respondent denies all knowledge of wrong or intent to mistreat, defraud or cheat with which he is charged.

And this respondent insists upon the force and effect of the statute of frauds and perjuries as to all of the alleged parol statements & pretenses alleged, concerning said sales or deeds, release- & mortgages of said land alleged.

And this respondent here now again protesting denies every allegation in said bill not hereinbefore admitted; and, now, having fully answered as to all and singular the allegations of said bill of complaint asks to be hence dismissed with his reasonable costs in this behalf expended.

B. S. PRETTYMAN.

46 EXHIBIT B.

(Copy.)

STATE OF ILLINOIS, } ss:
Mason County, }

Circuit Court, August Term, A. D. 1879.

LYDIA BRADLEY *vs.* BENJAMIN S. PRETTYMAN, SARAH A. Prettyman, Ansel Haines, Nancy J. Haines, Absolom McCune, Thomas B. Breedlove, Eliza Breedlove.	In Chancery. For Foreclosure & Relief.

And now on this day comes the complainant, Lydia Bradley, by Johnson and Foster and Dearborn and Campbell, her solicitors, and it appearing to the court herein from the writ- issued herein to the sheriffs of the counties of Mason and Tazewell and the returns thereon that the defendants, Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines and Nancy J. Haines had been duly served with process herein at least ten days prior to the first day of the present term of this court and had each appeared and filed their answers in this court to complainant's bill of complaint.

And it further appearing to the court that at the time of the commencement of this suit, from the affidavit of E. G. Johnson, one of the solicitors of the complainant, that the said Absolom McCune was not a resident of this State and that the said complainant under the direction of this court duly published a notice as the law requires in case of non-residents in the Democratic Clarion, a weekly newspaper published in Havana in said Mason county, notifying the said McCune of the pendency of this suit for the time and in the manner provided by law.

And it further appearing to the court that the said defendants Thomas B. Breedlove and Eliza Breedlove had been duly
47 served with process herein for more than ten days prior to the first day of the August term 1879 of this court and the said defendants Absolom McCune, Thomas B. Breedlove and Eliza Breedlove, having been severally three times solemnly called in open court to plead, answer or demur to the complainant's bill of complaint, came not, but herein made default;

It is therefore ordered, adjudged and decreed that the same be taken for confessed against the said defendants, Absolom McCune, Thomas B. Breedlove and Eliza Breedlove.

And the court having ordered this cause to be referred to the master in chancery of this court to take proofs, & also by agreement of the solicitors of the complainants and defendants and that Frank Ives, a notary public, should take and report certain other proofs now on file in this cause, and that Watson, a short hand reporter, should take and report the testimony of Allison Breedlove, Thomas Breedlove, Marshall Landers, Pardon Case and Wright Wyatt, now on file in this case, and the said master in chancery of this court, as well as the said Watson and the said Ives, having reported the same, and the said cause coming on for hearing upon the original and amended bills of complaint and the answers and amended answers of the defendants Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines, Nancy J. Haines and the replication of the complainant and default of the other defendants, and, the court being fully advised in the premises, doth find:

That the court has jurisdiction of the subject matter and the parties in this cause, and that there is now due from the defendant Absolom McCune, to the complainant, Lydia Bradley, the sum of thirty one thousand and five hundred dollars for principal and interest on the three certain promissory notes mentioned in complainant's bill,
each for the sum of five thousand dollars and due and pay-
48 able in one, two and three years from date with interest at ten per cent. per annum from the thirteenth day of August A. D. 1868, and secured by a deed of trust to one E. G. Johnson of the same date on the following described lands in said trust deed mentioned, to-wit:

The north east quarter; and the north east quarter of the south east quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of the north half of section

twenty-six (26), all in township twenty-three (23) north, of range six (6) west of the 3rd principal meridian in said Mason county.

It is further ordered, adjudged and decreed by the court that the title to the said lands, so far as the said McCune mortgage is concerned is in fee in the said Absolom McCune, free and clear of any claim in law or equity of the said Benjamin S. Prettyman, Sarah A. Prettyman, Ansel Haines, Nancy J. Haines, Thomas B. Breedlove and Eliza Breedlove and subject to the payment of the said amount due from the said McCune to the said complainant.

And it further appearing to the court that the amount now due from the said Absolom McCune to the said complainant was for the purchase money of the aforesaid lands;

It is therefore ordered, adjudged and decreed that the purchaser under the said sale (unless the amount shall be paid without sale) take the said lands free and clear of all right of dower of the wife of the said Absolom McCune or the wives of either of the said defendants.

It is further ordered, adjudged and decreed by the court, that the defendant pay to the complainant, within thirty days from this date the said sum of thirty-one thousand five hundred dollars, with lawful interest to be computed thereon, from this date until
49 paid, and also the costs of this suit, to be taxed by the clerk of this court.

And it is further ordered, adjudged and decreed that in default of said payment being made as aforesaid, by the defendant, then, and in that case, the said mortgaged premises mentioned in the bill of complaint in this cause, to-wit:

The north east quarter, and the north east quarter of the south east quarter of section twenty-two (22), the south half of section twenty-three (23) and the north half of section twenty-six (26); all in township twenty-three (23) north of range six (6) west of the 3rd principal meridian in said Mason county, or so much thereof as may be sufficient to realize the amount so found due the complainant, principal and interest and also the costs of this suit, including the fees, disbursements and commissions on the sale herein mentioned, and which may be sold separately without material injury to the parties interested, be sold at public vendue for cash in hand to the highest and best bidder, at the front door of the court house in the said county of Mason, that the master in chancery of this court execute this decree; and that he give public notice of the time and place of said sale by previously publishing the same for the space of thirty days in a newspaper published in said county; and that the complainant, or any one of the parties in this cause, may become the purchaser or purchasers; that the said master, on such sale being made execute a certificate of purchase to each purchaser or purchasers thereof, or any portion thereof; which certificate shall specify the lands or tenements purchased by such purchaser or purchasers, and the sum paid therefor, or, if purchased by the complainant in said bill, the amount of his bid, and the time when the purchaser will be entitled to a deed for

such lands or tenements, unless the same shall be redeemed according to law, and the said master shall also file, in the office
50 of the recorder of said county, a duplicate of such certificate or certificates signed by him.

And the said master out of the proceeds of such sale, shall retain his fees, disbursements and commissions on said sale; that he pay the officers of this court their costs in this suit; and that out of the remainder of said proceeds he pay to the complainant the said sum of thirty-one thousand five hundred dollars, together with legal interest thereon, from the date of this decree, to the day of sale; or, if such remainder shall be insufficient to pay the whole of said amount and interest, as aforesaid then that he apply said remainder to the extent to which it may reach in satisfaction of said amount and interest; and that the said master take receipts from the respective parties to whom he may have made payments as aforesaid, and file the same, together with his report of sale, in this court. And that, in case the said premises shall sell for more than sufficient to pay the principal, interest and costs in this suit, then that the said master, after making payment as aforesaid bring such surplus moneys into court without delay to abide the further order thereof.

And it is further ordered, adjudged and decreed that the defendants and all persons claiming by, through or under them since the commencement of this suit, be forever barred and foreclosed from all equity of redemption, and claim of, in and to said mortgaged premises or any part thereof, and if the same are not redeemed, according to law, by the defendants, their heirs, executors, administrators or grantees, within twelve months next after the day of such sale, and by all judgment creditors, and their representatives and assigns within fifteen months next after the day of said sale; and that at the expiration of said fifteen months next after the day of said sale, if said mortgaged premises, or any portion thereof, are not redeemed as aforesaid, then, in that case
51 upon the production to the then acting master in chancery, and filing in his office of the certificate of purchase executed by the master in chancery as aforesaid, to the purchaser or purchasers of said mortgaged premises, or any portion thereof, by such purchaser or purchasers his or their representatives or assigns, said master shall make, execute and deliver to such purchaser or purchasers, or to his or their representatives or assigns, good and sufficient conveyance or conveyances, in fee simple of said premises, or such portion thereof as shall have been sold to such purchaser or purchasers respectively.

And it is further ordered, adjudged and decreed, that upon the execution and delivery of the conveyance or conveyances as aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into the possession of the portion of said mortgaged premises so conveyed to him or them; and that any of the parties in this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of

this suit, has come into possession, under them or either of them, on the production of the master's deed of conveyance, and a certified copy of the order of this court, confirming the report of said sale, shall surrender possession thereof to such purchaser or purchasers, their representatives or assigns, and on refusal so to do, will be considered in contempt of this court.

And it is further ordered, adjudged and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so due the complainant, with interest as aforesaid, after deducting the costs and expenses of sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendant, Absolom McCune, who is personally liable for the pay-
52 ment of the debt secured by said mortgage remain liable to pay to the complainant the amount of the balance remaining due on said mortgage.

LYMAN LACEY, *Judge.*

Filed Aug. 22nd, 1879.
LEONARD SCHWENK, *Clerk.*

STATE OF ILLINOIS, } ss.:
Peoria County, }

Lydia Bradley on oath states that she is the complainant named in the foregoing bill and has heard the same read and knows the contents thereof, that the matters and things in said bill contained are true of her own knowledge except as to those matters which are therein stated to be on her information and belief and as to those matters she verily believes them to be true.

LYDIA BRADLEY.

Subscribed and sworn to before me this 26th day of May, A. D. 1902.

CLARA E. COMSTOCK,
[SEAL.] *Notary Public.*

(Filed May 29–1902.

J. C. SEVERNS,
Circuit Clerk.)

And be it remembered that afterwards, to-wit: on May 26, 1902, the same being one of the regular days of said term of said court, the following among other proceedings were had and entered of record in said court, that is to say:

53 "LYDIA A. BRADLEY } Injunction. # 15471.
vs.
H. W. LIGHTCAP. }

On this day comes the said complainant by her solicitors, Chiperfield & Chiperfield and Hammond, and moves the court to grant

unto her an injunction in this cause, and the court doth set the hearing on the motion for the first day of the next term of this court."

And be it remembered that afterwards, to-wit: on June 19, 1902, the same being one of the regular day- of said term of said court, the following among other proceedings were had and entered of record in said court, that is to say:

"Ordered by the court that all causes, motions and other matters not otherwise disposed of pertaining to this court, be and the same are continued until the next term of this court, and that court do now adjourne so to stand until the next regular term thereof, in course."

54 UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } ss:
County of Fulton, }

Pleas before the Honorable John A. Gray, one of the three judges of the ninth judicial circuit of the State of Illinois, and presiding judge of the circuit court of Fulton county, in the State aforesaid, at a term thereof begun and held at the court house in the city of Lewistown, in said county and State, on the twenty-second (the same being the fourth Monday) of September, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

Present: Honorable John A. Gray judge. E. W. Keefer, master in chancery. J. C. Severns, clerk. L. C. Fouts, sheriff.
Attest: J. C. SEVERNS, *Clerk.*

Court opened by proclamation.

And be it remembered that heretofore, to-wit: on September 16, A. D. 1902, there was filed with the clerk of this court, in the case of Bradley *vs.* Lightcap then pending in said court, the following notices, with receipts thereon, and the entry of the appearance of the said defendent, in the words and figures, to-wit:

"STATE OF ILLINOIS, } ss:
County of Fulton, }

In the Circuit Court, September Term, A. D. 1902.

LYDIA BRADLEY }
vs. } Bill for Injunction.
H. W. LIGHTCAP. }

To H. W. Lightcap, Wallace & Lacey, H. W. Masters, and George B. Foster.

GENTLEMEN: You will please take notice that at ten o'clock upon the 22nd day of September, A. D. 1902,—or so soon thereafter as counsel may be heard,—the complainant in the above entitled proceeding will appear in the circuit court of Fulton county, and make an application to the presiding judge thereof, that a temporary writ of injunction issue herein, as prayed in said bill of complaint; at which time and place you may appear and resist the same if you see fit so to do.

W. W. HAMMOND,
CHIPERFIELD & CHIPERFIELD,
Solicitors for Complainant."

(Filed Sep.-16-1902.

J. C. SEVERNS,
Circuit Clerk.)

"STATE OF ILLINOIS, } ss:
County of Fulton, }

In the Circuit Court, September Term, A. D. 1902.

LYDIA BRADLEY }
vs } Bill for Injunction.
H. W. LIGHTCAP. }

To H. W. Lightcap, Wallace & Lacey, H. W. Masters, and George B. Foster.

GENTLEMEN: You will please take notice that at ten o'clock upon the 22nd day of September, A. D. 1902,—or so soon thereafter as counsel may be heard, the complainant in the above-entitled proceeding will appear in the circuit court of Fulton county, and make an application to the presiding judge thereof, that a temporary writ of injunction issue herein, as prayed in said bill of complaint; at
which time and place you may appear and resist the same
56 if you see fit so to do.

W. W. HAMMOND,
CHIPERFIELD & CHIPERFIELD,
Solicitors for Complainant.

Rec'd a true copy of the above notice this 9th day of Sept. 1902.
H. W. MASTERS,
GEO. B. FOSTER, AND
WALLACE & LACEY,
Solicitors for Respondent."

(Filed Sep.–16–1902.

J. C. SEVERNS,
Circuit Clerk.)

"STATE OF ILLINOIS, } ss:
County of Fulton, }

In the Circuit Court, September Term, A. D. 1902.

LYDIA A. BRADLEY }
vs. } Bill for Injunction.
H. W. LIGHTCAP. }

To H. W. Lightcap, Wallace & Lacey, H. W. Masters, and George B. Foster.

GENTLEMEN: You will please take notice that at ten o'clock upon the 22nd day of September, A. D. 1902,—or so soon thereafter as counsel may be heard,—the complainant in the above entitled proceeding will appear in the circuit court of Fulton county, and make application to the presiding judge thereof, that a temporary writ of injunction issue herein, as prayed in said bill of complaint; at which time and place you may appear and resist the same if you see fit so to do.

W. W. HAMMOND,
CHIPERFIELD & CHIPERFIELD,
Solicitors for Complainant.

Received, Peoria Illinois, September 9th, 1902 of Messrs. Chiperfield & Chiperfield, notice of which the above is a copy.
GEORGE B. FOSTER,
Of Counsel for said Resp'd't."

(Filed Sep.–16–1902.

J. C. SEVERNS,
Circuit Clerk.)

57 "STATE OF ILLINOIS, } ss:
Fulton County, }

In the Fulton County Circuit Court, to the September Term, A. D. 1902.

LYDIA BRADLEY }
v. } Injunction, &c.
H. W. LIGHTCAP. }

We do hereby enter the appearance of the defendant, H. W. Lightcap, in the above entitled cause, and waive the issuing and service

of process upon him, and consent that any and all steps can be taken and had in said cause which might or could have been had or taken had a summons been regularly issued out of the office of the circuit clerk of Fulton county, Illinois, and duly and regularly served upon said defendant, more than ten (10) days prior to the first day of the present term of said September term of court.

WALLACE & LACEY AND
H. W. MASTERS AND
GEO. B. FOSTER,
Solicitors for Defendant."

(Filed Aug.-20-1902.

J. C. SEVERNS,
Circuit Clerk.)

58 And be it remembered that heretofore, to-wit: on September 16, 1902, there was filed in the above entitled cause, affidavits in support of bill for injunction, which said affidavits are in the words and figures following, that is to say:

"In the Circuit Court in and for the County of Fulton, in the September Term, A. D. 1902.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Bill for Injunction.

STATE OF ILLINOIS, }
Peoria County, } *ss:*

Lydia Bradley, being first duly sworn on oath, states that she is a resident of the county of Peoria and the State of Illinois, and is 86 years of age. That on or about the 30th day of June, 1867, she was the owner and holder of a certain mortgage and notes of Thomas B. Breedlove in the sum of $19,616 secured upon 1200 acres of land in Mason county, Illinois, described as follows: N. E. $\frac{1}{4}$ sec. 22; E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ sec. 22; S. $\frac{1}{2}$ of sec. 23; all sec. 26 in town 23 N., range 6 W. of the 3rd P. M. That afterwards on or about the 13th day of August, 1868, Benjamin S. Prettyman a resident of Pekin, Tazewell county, Illinois, called upon affiant and stated that he had purchased said lands from Thomas Breedlove subject to the mortgage aforesaid. That he had now arranged for a sale of 680 acres of the land to one Absolom McCune who was a large cattle dealer and would use the said lands for pasturage for cattle which he would buy in the West. That the 680 acres sold to McCune was the best part of the 1200 acres and that the purchase price was $25,000, and that said McCune would pay in cash all but $15,000 for which he proposed to give a mortgage upon the

680 acres of land to secure his three notes of $5000 each,
59 due in one, two and three years from date. These notes said Prettyman desired to give to affiant in part payment of the amount due upon the said Breedlove mortgage, offering to pay the remainder in money. That said Prettyman further stated that the lands were all capable of being cultivated and part of them were then under cultivation and producing corn. Affiant replied that she would have the land- investigated and if they were as represented she would accept the said McCune notes as part payment of the Breedlove indebtedness and release the remaining 520 acres of land. That affiant then instructed her agent and business manager, Mr. Cockle, who was present at this conversation but who is now dead, to go and see the lands and report to her their condition and value. That subsequently said Cockle did report that the representations of said Prettyman were correct, but affiant now believes that said Cockle was either deceived by said Prettyman and shown lands other than those included in the McCune mortgage or else that he was fraudulently persuaded by said Prettyman not to visit the said lands at all but to make such report upon the strength of said Prettyman's representations. Affiant, however, relying upon and believing the said representations of Prettyman and the report of her business agent accepted said McCune notes which were made payable direct to her as part payment of said Breedlove mortgage, received the remainder of the amount in money and released the Breedlove mortgage. That when the interest became due in August, 1871, she was unable to get any reply to her letters notifying said McCune that the interest was due on his mortgage, and then set on foot inquiries and learned that the said McCune had left the State of Illinois, had never taken any possession of said lands at all but had left the State almost immediately after the execution of said papers, and affiant believes that said McCune was an irresponsible person,
wholly unable to make such payment as was represented to
60 have been made by him, and affiant believes no such payment ever was made but the transfer to said McCune and the mortgage back to this affiant were arranged and made by said Prettyman with a view to swindling and defrauding affiant. Affiant further learned that the taxes had not been paid upon the property since the date of said McCune mortgage and she thereupon redeemed the same from the tax sales of 1869 and 1870 and paid the taxes for 1871. She then caused the lands to be advertised for sale under the said trust deed, and on the day appointed for sale sent her agent down to Manito to attend the sale but he returned and reported that the lands were too swampy to farm, and could not be sold, and he had adjourned the sale. Affiant then sent Austin F. Johnson to see the lands and take possession of them and make such use of them as he could. This he did in the fall of 1871, but was unable at that time to secure a tenant. That her next effort was directed to setting aside the said transaction with Prettyman and the said release of said Breedlove mortgage and she placed the papers in the hands of her attorney for that purpose, and at the March term, 1872, of the

circuit court of Mason county, he filed a bill in chancery to set aside said transaction and said release, alleging the facts hereinbefore set forth. That in the summer of that year, she believes in the month of August, 1872, she went down to visit the lands and inspect them herself. That one Allison Breedlove who lived about two miles north and east of the lands went with her to examine the lands and she then found that all of said lands were low, wet and swampy except perhaps 20 or 30 acres known as Hickory Grove mound, which was 25 or 30 feet higher than the surrounding lands and of different soil and appearance. That there was no plowed ground upon the farm except about 11 acres of said land in the S. W. corner. That it was so swampy, low and wet that it would not even bear the weight of a horse. That it was incapable of use as farming land and could only be used for mowing hay and for
61 pasturage in the driest part of the year, when parts of the land would be solid enough to support cattle. That it was not worth more than $10 per acre. That no person was in possession or control of it but it was wholly abandoned and unused. That affiant thereupon took possession with the object and purpose of making the most she could of a very bad bargain and leased the land to said Allison Breedlove upon the terms then and there agreed upon and put said Allison Breedlove in possession of said lands to cut and sell the hay and to take in cattle for pasturage, paying her one-half the net proceeds of the land: that the said Allison Breedlove then and there took possession of said property and from that time until about the year 1881 when he left the State of Illinois, he was continuously in the open, exclusive possession of said property, as tenant of affiant, keeping out trespassers and appropriating the said land to the use of this affiant so far as it was possible in its condition. That during the last two or three years of Breedlove's lease he sub-let the whole property to John A. Coddington who cut and sold considerable hay.

That in December, 1881, affiant undertook to improve the property and reduce some of it to cultivation, and for that purpose built a house on the mound, costing about $1000 and made a lease to W. N. Hitchcock and Jacob Behner, but the effort proved a failure on account of the swampy soil, and said John A. Coddington took the property again and continued to use it for hay taking a lease from affiant for all of said lands and succeeded to the possession and from that time until March 1st, 1895, said John A. Coddington and his sons Phineas Coddington and Wally B. Coddington occupied the whole of said premises living upon them and having the open, undisputed and exclusive possession of said lands as tenants under affiant.

That in the fall of 1884 affiant began to improve said
62 premises by ditching, fencing, breaking the sod and erecting farm buildings. That by the organization of the Hickory Grove drainage district and the construction of a system of ditches through said lands and adjoining lands the water was drained off and the lands were made dry enough

to cultivate. But not until the summer of 1885 were the lands dried out sufficiently to enable affiant to break up the sod. That affiant began at that time to reduce the land to cultivation but found the land so heavy that breaking was very expensive and she was obliged to pay large sums of money, to-wit, the sum of $3.50 per acre for getting said sod broken. That after said lands were broken they proved to be infested with wire worms, cut worms and other pests which almost totally destroyed the crops for several years. That the soil itself proved to be very light, almost like peat and the corn failed to reach maturity before frosts came on in the fall so that for several years the crops were of very little value. But affiant persisted in her efforts to reduce said land to cultivation and applied various fertilizers and correctives to said soil and by having analysis of the soil made, she was finally successful in correcting the deficiencies of said soil, so as to make it productive. But affiant shows that she was put to much expense in doing this and that the expense of breaking and correcting said soil was greater than the total income derived from the crops for many years after it was drained.

And affiant further states that afterward said farm was divided into three parts and said Wally B. Coddington and Phineas Coddington were each given farms and affiant then erected two more dwelling houses at an expense of $1000 each, three barns at an expense of $500 each, and three corn cribs at an expense of $500 each, for the accommodation of said additional tenants.

Affiant also paid all of the general taxes accruing against said lands amounting to the sum of $5000 on the first day of July, 1895.

That she also paid all of the drainage assessments in said
63 Hickory Grove drainage district amounting to over $5000 on the 1st day of July, 1895.

And affiant further shows that said bill in chancery to set aside the release of the Breedlove mortgage was prosecuted in the circuit court of Mason county and was defended and resisted by said B. S. Prettyman for seven years until October, 1879, when a decree was rendered not in accordance with the prayer of the bill but finding that said McCune mortgage was the only lien upon said premises and ordering a foreclosure thereof. That this was a defeat for affiant and she then realized that she must take the lands she had possession of as payment of the mortgage debt and interest. That when said land was sold at the master's sale she had the same struck off and bid in for her at the sum of $10,000 for the purpose of protecting her title and possession and preventing the arising of an outstanding title against said lands. That the certificate of purchase was taken and held by her attorneys Johnson, Dearborn and Campbell and affiant has no recollection of ever having seen it. But afterwards in 1885 when said Johnson reported to her the results of said litigation he advised her that the title was now in her and that she had got a complete title to said lands but had been defeated in her effort to recover and secure the remaining lands released from said Breedlove mortgage. That affiant under-

stood and believed that a deed had been issued to her by the master in chancery in such foreclosure suit but is not now able to find such a deed nor has she been able to find the said certificate of purchase. That thereafter she continued to hold the said lands as she had done from the time she took possession in 1872, claiming to be the owner thereof and has ever since held such possession and claimed such ownership. That she has paid all of the taxes accruing thereon and no person or persons has ever interferred with her possession or claimed any right to said lands up to July 13th, 1895, when
64 the said Henry W. Lightcap, defendant in the above entitled cause brought actions of ejectment in the circuit court of Mason county against the tenants of affiant in possession of said lands, claiming to be the owner thereof in fee. That affiant immediately entered her appearance and was substituted as defendant in place of her said tenants and upon her motion the case was transferred to Fulton county for trial. That the first trial took place at the March term, 1896, resulting in a judgment against the plaintiff. That the plaintiff in said case appealed to the supreme court of the State of Illinois and at the October term of said court the said judgment was reversed and the cause remanded to the circuit court. That affiant caused her attorneys to apply for a re-hearing which was granted and the case was again argued before the supreme court of the State of Illinois at the December term, 1898. That afterwards on the 19th day of October, 1899, the said supreme court re-affirmed its former opinion holding that affiant had no title to said premises because she was unable to show that she had taken out a deed from the master in chancery within a certain time limited by the statutes of the State of Illinois. But affiant caused her attorneys to make a further application for a second re-hearing before said court, which was granted at the February term, 1900, and said cause was again re-argued, but on the 19th day of October, 1900, the said supreme court of the State of Illinois again adhered to its former opinion reversing and remanding said cause. That afterwards at the May term of the circuit court of Fulton county, 1901, said cause came up again for trial before said court and affiant made such defense as she was able under the rulings of the said supreme court, but said cause was taken from the jury by the trial court and the said jury were instructed to find affiant guilty as alleged in the said declaration. And thereupon judgment was entered in favor of said H. W. Lightcap. But affiant being advised that under the laws of the State of Illinois
65 she was entitled to a second trial of said cause as a matter of right made application to said court for such new trial and the same was granted and said cause now stands for hearing *de novo* at the January term, 1902, of said circuit court of Fulton county.

And affiant further shows that it appears by the deeds offered in evidence at such trial that said Benjamin S. Prettyman after the execution and delivery to affiant of said mortgage by Absalom McCune took a reconveyance of said property subject to said

mortgage to himself and that at the time of the prosecution of said bill in chancery in the circuit court of Mason county he was the holder of the equity of redemption and continued ever after to be the holder of such equity of redemption until the same was extinguished by such foreclosure proceeding, and not until a very short time before the commencement of said ejectment suits by the defendant herein did he make the conveyance to the defendant under which he claimed in said ejectment suits. That said H. W. Lightcap was at that time a resident of Havana in Mason county which is within a few miles of the lands hereinbefore described and that said H. W. Lightcap knew that the lands were in possession of affiant and her tenants but made no inquiry of them or of her and gave no notice to affiant or her tenants that he had or claimed to have any title to said lands. That said Lightcap might have ascertained by visiting the lands or by calling upon affiant what her right, title, interest and claim to said premises was, but that the first notice affiant had of said Lightcap's claims was when service was made upon her tenants in the actions of ejectment above referred to. That said Prettyman lived within ten miles of said lands, was frequently in the vicinity and was able to know, and affiant believes did know, of the improvements, expenses and betterments which affiant was bestowing upon said premises, but during all that time he made no claim to title or ownership and never dis-
66 closed to affiant or her agent or tenants that he had or claimed to have any interest in said premises. That Pekin is only ten miles from Peoria where affiant resides and said Prettyman could at any time have communicated with affiant.

And affiant further shows that by means of the improvements she has put upon said premises the land has increased in value so that it is now worth and would sell in the open market for $65.00 per acre. That said McCune has never returned to the State of Illinois so far as she is aware and that the deficiency judgment against said McCune in said foreclosure proceeding has never been paid. That neither said McCune nor said Prettyman nor any defendant in said foreclosure suit ever paid or offered to pay to affiant any part of said indebtedness or to redeem said premises from said foreclosure sale.

LYDIA BRADLEY.

Subscribed and sworn to before me, this 6th day of May, A. D. 1902.

CLARA E. COMSTOCK,
[SEAL.] *Notary Public.*

STATE OF ILLINOIS, }
County of Fulton. }

— Court of said County, September Term, A. D. 1902.

LYDIA BRADLEY }
vs. } Bill for Injunction.
H. W. LIGHTCAP. }

STATE OF ILLINOIS, }
Peoria County, } *ss:*

Austin F. Johnson being first duly sworn on oath states, I am 55 years old and a resident of the city of Peoria. I was book-
67 keeper and business agent of Lydia Bradley from July 1, 1871, to some time in 1880. Among her securities I found three notes of Absolom McCune for $5000 each, drawing 7 per cent. semi-annual interest, secured by trust deed in land in Mason county, Illinois. The notes bore date 1868. The interest was past due and I notified McCune by mail, but the letters came back uncalled for. I never got any response, and never succeeded in finding him although I made great efforts to do so.

I also discovered that the taxes on the property had not been paid from the date of the trust deed, and I redeemed the land and paid the taxes of 1871.

Then I went down to Manito in 1871, can't fix the date, to see the land and see what we could do with it. I found it abandoned and no one looking after it. I went onto it and walked over as much of it as I could, with the purpose of taking possession of it for Mrs. Bradley. At tha time I was not able to make any arrangements with any one to take charge of the land, but later opened negotiations with Allison Breedlove which resulted in his taking a lease. From that time on we had exclusive possession of the property and derived some income from it. At the same time Mrs. Bradley prosecuted a suit to recover the other lands she had released.

No one claimed those lands or disputed her right to them and I took them and managed them just the same as I did other lands belonging to Mrs. Bradley. We knew McCune had left the country and the land was not worth the debt, so we considered the lands Mrs. Bradley's and never expected them to be redeemed.

AUSTIN F. JOHNSON.

Subscribed and sworn to before me, this 22nd day of May A. D. 1902.

CLARA E. COMSTOCK,
[SEAL.] *Notary Public.*

68 STATE OF ILLINOIS, } ss:
Mason County, }

George Gilson, being duly sworn on oath states, I reside at Havana, Illinois, am fifty-four years old. I lived in Mackinaw Bottom in 1872 on land adjoining the Lydia Bradley farm on the north. I worked for Bart Breedlove, a brother of Allison Breedlove. I knew the latter very well. He lived about two miles from us. I assisted him in looking after Mrs. Bradley's land from 1872 to 1875. I was present when Mrs. Bradley visited the land in 1872. She came down with Mr. Breedlove in a buggy and I rode over a horse back. She went onto the land a little ways but could not go far as the land was very low and swampy. I heard some of the conversation between her and Mr. Breedlove about his taking charge of the land for her upon a percentage of the profits. From that time Allison Breedlove acted as Mrs. Bradley's tenant and agent for the property. I used to watch people from going in there and cutting wood off of Hickory Grove mound. I was there all the time looking after cattle and Mr. Breedlove told me if anybody wanted any grass or to turn in cattle I could attend to it for him. I was herding cattle on the adjoining land and did this as an accommodation to him. I helped put up fences around the ourside lines to keep the cattle in. We put up some fences the next spring after Mrs. Bradley was there. There were pieces of fence and posts along the lines but they would get burned off about every year when the fire ran over the swamp and we had to repair them. We strung some new wire. We put up the fences to keep in cattle which we had taken in for pasture on Mrs. Bradley's land. The owners of the cattle made the arrangements with Mr. Allison Breedlove. Everybody in the neighborhood turned cattle in there. I was there as often as once a wee*l* and looked after the fences and pulled cattle out
of the mud when they got mired. There was a good deal of
69 hay cut off of the land during this time. The people who cut the hay bought it of Mr. Allison Breedlove. They went in and selected their own place for cutting the hay, picking out the highest spots and most convenient to get at the hay. I also knew Benjamin S. Prettyman intimately. He owned land adjoining on the north and was frequently in that vicinity. I had many talks with him. Once in a while we used to josh him about selling the land and getting such a price for it and he would laugh in a joking way and say, "Why, Mrs. Bradley has got the money, she can spend it," or something of that kind and pass it off. He never denied that the land was Mrs. Bradley's. He said the land was wet and marshy but Mrs. Bradley had the money to ditch it. The land was very soft up there where Mrs. Bradley's land was but further north towards the Mackinaw creek the ground was harder and good farm land. You could not get across Mrs. Bradley's land with a wagon. There *was* only about two months in the year when cattle could pasture on it. There was a mound on the land which was

high, solid ground and on this there was considerable hickory timber. I used to have to watch people from going in there and cutting it. The place was known as the Hickory Grove mound and as the Widow Bradley land. The lands did not lie in open commons and cattle turned out onto the highways could not get onto this land without going over other people's farms. No cattle were put in there without permission of Allison Breedlove and no hay was cut off of there without his permission so far as we knew. Mr. Prettyman lived in Pekin about ten miles northeast of these lands.

GEORGE W. GILSON.

Subscribed and sworn to before me, this 23rd day of May A. D. 1902.

JOHN W. PITMAN,
Notary Public.

[SEAL.]

70 STATE OF INDIANA, } ss:
Morgan County, }

Allison Breedlove being first duly affirmed on oath states that he resides in Monrovia, Morgan county, Indiana. That prior to 1881 he resided in Tazewell county, Illinois, near the Hickory Grove mound, which is situated upon the land known as the Bradley farm. That affiant owned and lived on a farm about two miles from Hickory Grove mound. That he was acquainted with T. S. Bradley, now deceased, who was husband of Lydia Bradley, and after the death of said T. S. Bradley had frequent business relations with Lydia Bradley. That said Hickory Grove farm was a part of a large tract of land once owned by the Breedlove family, and affiant had been familiar with it many years prior to the time it came into the possession of Lydia Bradley. That affiant's uncle Bales Breedlove when he was the owner of the land, fenced it and used it for pasture, and although fires frequently burned over the land in the fall, portions of the fence remained, and the owners were accustomed to fix them up each year so as to keep cattle in. That affiant and Tom Breedlove subsequently became the owners of said land, although the title stood in the name of Tom Breedlove. That Tom Breedlove borrowed money from T. S. Bradley on 1200 acres of the Breedlove tract, including the 680 acres now claimed by Mrs. Bradley. That subsequently he sold the 1200 acres to Benjamin S. Prettyman, who resided at Pekin, Illinois, about ten miles from the land, subject to said mortgage to Bradley. That while said Prettyman was the owner of said lands he used them in much the same manner that other owners had done, and cleaned out and deepened the ditches. Afterwards through some arrangement with Mrs. Bradley of which this affiant had no direct knowledge said Prettyman claimed to have sold the 680 acres to one Absolom McCune, and to have secured the release of the 520 acres lying to the south, and
71 said Prettyman continued to claim and exercise acts of ownership over said 520 acres of land and afterwards sold them to

one Henry Dix. McCune was a man of no means. Just worked around at odd jobs, and never did anything with the land but left the country soon after the deal was made and was never heard of in those parts afterwards.

Some time after this transaction Mrs. Bradley inquired of me about the lands and about McCune. I told her what I knew and offered to take her over to see the land. I knew from what I had heard of the transaction, which piece had been deeded to McCune. So she came down to Green Valley in the summer of 1872, in real warm weather, and I took her over to the land. It was all swamp land except the mound, which stood up like an island in the middle of the swamp and was a different formation. She tried to walk out onto the land stepping from one bunch of grass to another, but could not go far. Some parts of the land were more solid than the place she tried. She was very much surprised to find the land so poor. She offered me a lease of the land if I would give her one half of the net proceeds of the hay and pasturage, and I accepted her offer. I took charge of the land at once, and from that time until some time in 1881 when I came to Indiana, I had the exclusive control and possession of the land as tenant under Mrs. Bradley, and made regular settlements with her for the proceeds of the hay and pasturage. I sold the hay on the ground, the purchaser choosing the best place to cut and paying by the acre or ton for what he took off. I also took cattle to pasture and made fences enough to keep them in. No one was permitted to get hay or turn cattle in there without my permission and I believe I had exclusive possession of the land all that time and I made all the use of it possible in its condition at that time.

During all this time Benjamin Prettyman was a frequent
72 visitor at our house and knew that I had charge of the land for Mrs. Bradley, and frequently talked with me about it. When reference was made to the manner in which he had unloaded the land upon Mrs. Bradley, he would reply that he would let Mrs. Bradley have it. She was able to drain it.

Affiant further states that he then owned and still owns large tracts of land in that vicinity and had owned and dealt in similar lands in that vicinity, and was acquainted with the values of such lands; that the lands referred to were worth at that time not more than $10.00 per acre.

That for a year or two before affiant left Illinois he sublet all of said lands to John A. Coddington who made roads through the land and cut a great deal of hay, and affiant left him in possession of the lands.

And further affiant saith not.

ALLISON BREEDLOVE.

Subscribed and affirmed to before me, this 23 day of May A. D. 1902.

N. E. HUBBARD,
Notary Public.

[SEAL.]

My com. expires Oct. 30th 1902.

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73 STATE OF ILLINOIS, } ss:
Mason County, }

Phineas Coddington, being first duly sworn on oath states, that he is a son of John A. Coddington, thirty-six years old, and resides in Mason county. That he knew the Hickory Grove farm or Lydia Bradley farm and lived on it with his father, going there in 1878. That they occupied the whole of the farm which was then low, wet, swamp land and used only for cutting hay. That there had been fences around the land before they moved onto it and there were still evidenced of the fences partly burned off but sufficient to mark all of the lines on all sides of the land. There was a ditch on the west line at that time. Later when the land was drained by the Hickory Grove drainage district a ditch was run on the east line and the ditch on the west line was deepened and in so doing the fence posts referred to were dug up and affiant pulled a good many of them out of the land. It was evidently an old fence. There was one small piece of the land, about eleven acres, in the southwest corner which came up onto the sand land and was dry enough to cultivate. This was all the land of the 680 acres which was cultivated at the time we went onto the place. The first three years we rented under Allison Breedlove who was acting as Mrs. Bradley's agent for the land. After that my father took a lease directly from Mrs. Bradley. Later when I married, Mrs. Bradley divided the farm and gave me a lease of 240 acres of the east side. She had already built a house there for my father and at this time built another house on the west side of the mound for him and I took the old house for my own. She also built a barn and a corn crib at each place. Later on when my brother Wally Coddington came of age she gave him the west 200 acres of the land and built a house and barn and corn crib on that. After the dredge boat had gone through and dug the main ditches Mrs. Bradley laid tiling all through the land at an expense of about $600. All of the buildings, fences,
74 etc., must have cost more than $5000. I remember going with my father to Pekin at one time, where we met B. S. Prettyman at his office and he talked with us about the farm. He knew that we were tenants on Mrs. Bradley's farm and seemed to be well posted about what was going on in the neighborhood. He said that he had once owned the land and mentioned what ditching and fencing he had done there when he owned it. He made no claim that he had any interest in it at this time. During all of the time we lived on the farm I never heard any one make any claim to the possession or the title of the farm as against Mrs. Bradley. I moved off the place in 1894. The first house was built in 1881, the last one in 1892.

PHINEAS CODDINGTON.

Subscribed and sworn to before me, this 23rd day of May, A. D. 1902.

JOHN W. PITMAN,
Notary Public.

[SEAL.]

75 STATE OF ILLINOIS, } ss:
Mason County, }

John A. Coddington being first duly sworn on oath states, that he is a resident of the county of Mason and State of Illinois, and is sixty years of age. That he has known the Hickory Grove farm also called the Lydia Bradley farm since 1878. That he rented the hay ground on said farm from Allison Breedlove as agent of Lydia Bradley in that year and from that time on until said Allison Breedlove gave up the land and left the State affiant rented the hay land from him and paid the rent to him as such agent of Lydia Bradley. That after said Allison Breedlove gave up the land affiant took the lease of all of said land consisting of 680 acres and with himself and two sons continued to occupy the land until 1894 just before the commencement of the ejectment suits by H. W. Lightcap against Mrs. Bradley's tenants. That affiant then removed to another farm of Mrs. Bradley's and was succeeded in the possession of said Hickory Grove farm by other tenants of Mrs. Bradley.

That when affiant first knew the farm it was low, wet, swampy land, unfit for cultivation and no part of it capable of cultivation except one corner which ran up onto the said land, about eleven acres of which was dry enough to farm, and one half of Hickory Grove mound which was like an island in the swamp and was used for pasture and later for the site of the dwelling houses. The mound was covered with hickory timber. That affiant first rented the ground from Allison Breedlove at $1.00 per acre for the hay he could cut off of it, and built hay roads and cut canals through the land so as to enable him to get the hay off. A part of the time the hay was loaded onto boats and floated out. That during this time affiant had exclusive use of all of the lands under Allison Breedlove and later when he took a lease of them himself he had exclusive use of all of the
76 lands and was in the open and exclusive possession thereof as tenant of Lydia Bradley. That the lands in the condition they were when affiant took them were of comparatively little value and were estimated to be worth all the way from $1.00 to $10.00 per acre. That soon after affiant took a lease to himself Mrs. Bradley built a house on the Hickory Grove mound costing about $1000. She also furnished him with a car load of cedar posts and he began fencing the land and from that time on work was continued upon the property in the way of fencing, ditching and draining until the Hickory Grove drainage district was formed in 1885 when the land was thoroughly drained of water by a large ditch running through the land and also on the east line. After the land became dry enough to plow Mrs. Bradley hired me to break the land up, paying me $3.00 an acre for the breaking. It was very difficult work, the land being full of strong hard roots, and when broken up it was so soft that plows would not scour in it and the land was like decomposed vegetable matter, so light that it could not turn over with

the plow. As soon as it became dried out it was inflammable so that we could not burn the corn stalks on the ground without setting the ground afire and when a fire got started in the soil it would burn clear down to the water and destroy the soil. It was necessary to keep constantly on the lookout for accidental fires and frequently to fight the fire for days in order to save the land. After the land had been broken we tried growing corn upon it but the soil seemed to be different from other lands and the corn did not get ripe but would be still growing when the frosts came in the fall. It was also infested with wire worm-, cut worms and other pests year after year so that it was very unproductive and difficult to manage. After the ground got thoroughly dried out it began to crack open so that a horse could not walk across
77 it and it became impossible to plow the land in any ordinary way. We were obliged to rig wire ropes across the land and draw the plow and plow the cracks shut. It was more difficult work than the original breaking. These difficulties continued for several years so that it was not until a very short time before I left the farm that it began to produce as much as it cost, to farm it.

When my eldest son, Phineas Coddington, married, Mrs. Bradley built another house on the mound and also built a large corn crib holding 5000 bu. of corn, and a barn holding ten head of horses and their feed. She also built a new barn on the place where I lived. When my second son came of age she built another house on the farm for him, together with a barn and corn crib. These improvements must have cost in the neighborhood of $5000. She also laid tile from the main ditches over all of the land at a large cost and expense. It was also necessary to throw up a road across the swamp leading to town and this road ran on Mrs. Bradley's north line and she paid for half of the work of throwing up the road and digging the ditch along the side.

I knew B. S. Prettyman very well and saw him frequently. He owned land in the immediate vicinity of this farm and was frequently in the neighborhood.

Affiant at one time had some conversation with him in regard to the farm in which Mr. Prettyman showed a full knowledge of what was being done with the land and that it had been redeemed from water and highly improved and spoke of the land as property that he had once owned and told what he done with the land when he owned it. But at no time during the tenancy of affiant did anybody ever claim any right, title or interest in said property or right to the possession thereof except Lydia Bradley.

JOHN A. CODDINGTON.

78 Subscribed and sworn to before me, this 23rd day of May, A. D. 1902.

JOHN W. PITMAN,
Notary Public.

[SEAL.]

(Filed Sep.-16-1902.

J. C. SEVERNS,
Circuit Clerk.)

And be it remembered that afterwards, to-wit: on September 29, 1902, the same being one of the regular days of said term of said court, the Honorable G. W. Thompson, judge, presiding, the following among other proceedings were had and entered of record in said court, in the words and figures, viz:

"LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Injunction. #15471.

Now on this day comes the said defendant in the above entitled cause, by his solicitors, and files herein his demurrer to the bill of complaint of complainant. And the said complainant being present in court, by her solicitors, the hearing of this cause is begun."

And said demurrer as aforesaid, being in writing, a copy thereof is hereto appended, in the words and figures following, that is to say:

"STATE OF ILLINOIS, } *ss:*
County of Fulton, }

In the Circuit Court of Fulton County, September Term, A. D. 1902.

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } Injunction.

And now comes the defendant, H. W. Lightcap, by Wallace & Lacey and Foster and Masters, his solicitors, by way of protestation, not confessing or admitting any of the matters and things in complainant's bill of complaint to be true, as therein alleged, and says that said complainant ought not to have or maintain her said bill against this defendant, because the matters and things set forth in
79 said bill are not sufficient in law or equity for this defendant to answer unto; and of this the defendant prays judgment of this court, etc.

WALLACE & LACEY,
FOSTER & MASTERS,
Solicitors for Defendant.

In addition to the aforesaid demurrer, the defendant assigns the following special causes:—

1st. The bill contains immaterial and irrelevant matter.

2nd. The bill seeks to controvert and annul the proceedings and decree of the circuit court of Mason county, in the suit of Lydia Bradley *vs.* Absolom McCune *et al.* rendered more than twenty years ago.

3rd. The bill seeks to make a court of review of this court, to re-

view and correct alleged errors in the judgment and opinions of the supreme court of this State in the ejectment suit of Lightcap *vs.* Bradley, referred to in said bill.

4th. Because said bill shows that the complainant has an adequate remedy at law.

5th. Because the said bill is too indefinite, uncertain and insufficient.

6th. Because said bill shows laches on the part of the complainant, and seeks to avoid the effort of her own laches.

7th. And for other good and sufficient causes appearing on the face of the bill.

WALLACE & LACEY,
FOSTER & MASTERS,
Sol. for Def't."

(Filed Sep.–29–1902.

J. C. SEVERNS,
Circuit Clerk.)

80 And be it remembered that afterwards, to-wit: on October 1st, 1902, the same being one of the regular days of said term of said court, Honorable G. W. Thompson, judge, presiding, the following among other proceedings were had and entered of record in said court, in the words and figures, viz:

"LYDIA BRADLEY *vs.* H. W. LIGHTCAP. } Injunction. # 15471.

On this day come the respective parties to this suit, by their solicitors, and the hearing of this cause is completed, and of its decision of the matter the court doth further consider."

And be it remembered that afterwards, to-wit: on October 17th 1902, the same being one of the regular days of said term of said court, Honorable G. W. Thompson, judge, presiding, the following among other proceedings were had and entered of record in said court, in the words and figures, viz:

81 "LYDIA BRADLEY *vs.* H. W. LIGHTCAP. } Injunction. # 15471.

And now on this day this cause having come on to be heard upon the demurrer of the defendant to the bill of complaint herein; and the court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, doth find that the equities of this cause are with the defendant, and that the defendant's demurrer to said bill of complaint of complainant should be sustained, and complainant electing to stand by her bill and refusing to plead further.

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed; and the court doth hereby order, adjudge and decree, that the demurrer of the said defendant to the said bill of complaint of complainant be and the same *are* hereby sustained; and that the said bill of complaint be, and the same is hereby dismissed for want of equity with costs to the defendant and against the complainant, to be taxed by the clerk of this court.

And to which finding and decree of the court, the complainant then and there excepted, and prays an appeal to the supreme court of the State of Illinois; which is hereby granted and allowed, upon complainant filing an appeal bond in the sum of five hundred dollars within thirty days from the rendition of this decree, said bond to be approved by the clerk of this court.

G. W. THOMPSON, *Judge.*"

82 Said appeal bond to the supreme court of the State of Illinois, having been filed herein, and approved by the clerk of this court, a copy thereof is hereto appended, in the words and figures following, that is to say:

"Know all men by these presents, that we Lydia Bradley, George W. Scott, and Harry A. Hammond of the county of Fulton and State of Illinois, are held and firmly bound unto H. W. Lightcap in the penal sum of five hundred dollars, for the payment of which well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Peoria Ill. this 25 day of October in the year of our Lord one thousand nine hundred and two.

The condition of the above obligation is such, that whereas, the said H. W. Lightcap did, on the 17" day of October one thousand nine hundred and two at a term of the circuit court, then being holden within and for the county of Fulton, and State of Illinois, obtain a judgment of dismissal against the above bounden Lydia Bradley and for costs of suit, in the cause therein pending upon the chancery side thereof for injunction & relief wherein Lydia Bradley was plaintiff and H. W. Lightcap def't from which judgment the said complainant has prayed for and obtained an appeal to the supreme court of the said State of Illinois.

Now if the said Lydia Bradley shall duly prosecute said appeal, and shall moreover pay the amount of said judgment, costs, interest and damages, rendered and to be rendered against her the said Lydia Bradley in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void, otherwise to remain in full force and virtue.

LYDIA BRADLEY. [L. S.]
GEORGE W. SCOTT. [L. S.]
HARRY A. HAMMOND. [L. S.]

(Filed and approved this 28th day of Oct. A. D. 1902.
J. C. SEVERNS, *Clerk.*)

83 STATE OF ILLINOIS, } ss:
County of Fulton, }

I, J. C. Severns, clerk of the circuit court of the county of Fulton, in the State aforesaid, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true and complete copy of all of the pleadings, orders of court, decree, appeal bond, records and proceedings in a certain cause lately pending in said court, on the chancery side thereof, wherein Lydia A. Bradley was complainant and H. W. Lightcap was defendant, as the same appears from the records and files in my office now remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of November, A. D. 1902.

[SEAL.] (Signed) J. C. SEVERNS,
Clerk of the Circuit Court and Keeper of the Records and Seal Thereof.

84 STATE OF ILLINOIS, } ss:
Fulton County, }

LYDIA BRADLEY, Complainant,
vs.
H. W. LIGHTCAP, Defendant. } Appeal from Fulton.

To the justices of the supreme court of the State of Illinois:

Now comes Lydia Bradley, complainant in the foregoing proceedings, by W. W. Hammond and Chipperfield & Chipperfield her solicitors, and shows that in all the said proceedings there is manifest error, in this, to-wit:

The circuit court erred in sustaining the demurrer to complainant's bill, and in dismissing the same for want of equity.

The circuit court erred in not overruling the said demurrer and requiring defendant *ot* answer.

W. W. HAMMOND AND
CHIPPERFIELD & CHIPPERFIELD,
Solicitors for Complainant.

85 Supreme Court of Illinois, December Term, A. D. 1902.

LYDIA BRADLEY, Appellant,
vs.
H. W. LIGHTCAP, Appellee. } Appeal from Fulton. Injunction.

Additional Assignment of Errors.

Now comes the appellant by W. W. Hammond and Chipperfield & Chipperfield, her solicitors, and by leave of court first had and obtained, presents the following additional assignment and specification of errors and says, that in the record and proceedings and in

the rendering of the decree of the circuit court aforesaid, and in the foregoing record, there is manifest error in this to-wit:

1. The circuit court erred in not holding that the certain statute of Illinois approved March 22nd 1872, in force July 1st 1872, entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree;" and section 30 thereof, set out in said bill of complaint, did not apply to the case, right title and equity of appellant, set forth in her said bill of complaint.

2. The construction and interpretation and application by said circuit court of said statute of the State of Illinois, approved March 22nd, 1872, (and more fully entitled and described in the additional assignment and specification of errors, number one (1) foregoing) was and is unconstitutional and in violation of section 10 article one of the Constitution of the United States of America.

2. The construction and interpretation and application by said circuit court of said statute of the State of Illinois, approved March 22, 1872, (more fully entitled and described in the additional assignment and specification of errors, number one (1) foregoing) was and is unconstitutional and in violation of section 10 of article one of the Constitution of the United States of America.

86 3. The construction and interpretation and application by the said circuit court, of said statute of the State of Illinois approved March 22, 1872, (and more fully entitled and described in the additional assignment and specification of errors number one (1) foregoing) was and is unconstitutional and in violation of section 14, of article two, of the constitution of the State of Illinois.

4. Said statute of the State of Illinois, approved March 22, 1872, (and more fully entitled and described in additional assignment and specification of errors number one (1) foregoing) and section 30 of said statute, as construed and applied by the circuit court in this case, is unconstitutional, and in violation of section 10 of article one of the Constitution of the United States of America.

5. Said statute of the State of Illinois, approved March 22, 1872, (and more fully entitled and described in additional assignment and specification of errors number one (1) foregoing) and section 30 of said statute, as construed and applied by the circuit court in this case, is unconstitutional and in violation of section 14, of article two of the constitution of the State of Illinois.

6. The construction and interpretation and application by the circuit court, of said statute of the State of Illinois, approved March 22, 1872, (and more fully entitled and described in the additional assignment and specification of errors, number one, (1) foregoing) was and is in violation of a certain statute of the United States known and called section 1979 of the Revised Statutes of the United States according to the revision of 1874, approved June 22nd 1874.

7. Said statute of the State of Illinois, approved March 22, 1872, (and more fully entitled and described in additional assignment and specification of errors number one (1) foregoing) and section 30 of

said statute, as construed and applied by the circuit court in this case, was and is in violation of a certain statute of the United
87 States known and called section 1979 of the Revised Statutes according to the revision of 1874, approved June 22nd, 1874.

8. The circuit court erred in not finding the allegations of the bill sufficient to establish equitable title in the complainant as against the defendant.

9. The circuit court erred in not finding the allegations of the bill sufficient to show a complete divestiture of the title of defendant in equity, as against complainant.

10. The court erred in not finding the allegations of the bill sufficient to create an equitable estoppel against defendant.

Wherefore and for other manifest errors, in violation of the Constitution and laws of the United States, the appellant prays that said decree of said circuit court may be reversed and set aside and held for naught and said cause remanded for further proceedings in conformity to said Constitution and laws of the United States of America.

Respectfully submitted.

W. W. HAMMOND AND
CHIPPERFIELD & CHIPPERFIELD,
Solicitors for Appellant.

88 And afterwards, to-wit: on the 10th day of December, A. D. 1902, certain proceedings were had in said court and entered of record, in the words and figures following, viz:

LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } 2865. Appeal from Fulton.

And now on this day leave is granted appellant to make additional assignment of errors in the record herein.

And afterwards, to-wit: on the 13th day of December A. D. 1902 certain proceedings were had in said court and entered of record, in the words and figures following, viz:

89 LYDIA BRADLEY
vs.
H. W. LIGHTCAP. } No. 2865. Appeal from Fulton.

Now on this day come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that —— —— appellant, hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee —— —— having en-

tered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause — is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be and the same is hereby taken under advisement.

90 At a supreme court, begun and held at Springfield on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and three, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice. Jacob W. Wilkin, justice, Joseph N. Carter, justice, James H. Cartwright, justice, Carroll C. Boggs, justice, John P. Hand, justice, James B. Ricks, justice, Howland J. Hamlin, attorney general. Benjamin H. Brainerd, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered, to-wit, on the twenty-fourth day of April, A. D. 1903, the same being one of the days of the term of court aforesaid, the following proceedings were by said court, had and entered of record, to-wit:

LYDIA BRADLEY
v.
H. W. LIGHTCAP. } No. 2865. Appeal from Fulton.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore it is considered by the court, that the decree aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error, and it is further considered by the court, that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor:

91 At a supreme court, begun and held at Springfield on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and three, within and for the State of Illinois,

Present: Benjamin D. Magruder, chief justice. Jacob W. Wilkin, justice, Joseph N. Carter, justice, James H. Cartwright, justice, Car-

roll C. Boggs, justice, John P. Hand, justice, James B. Ricks, justice. Howland J. Hamlin, attorney general. Benjamin H. Brainerd, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that afterwards, to-wit, on the 24th day of April, 1903, the opinion of the court was filed in the words and figures following, to-wit:

LYDIA BRADLEY *vs.* H. W. LIGHTCAP. } No. 2865. Error to —. Appeal from Fulton.

92 Docket No. 2865, Agenda 37, Northern Div., Dec., 1902.

LYDIA BRADLEY *v.* H. W. LIGHTCAP.

Mr. Justice CARTWRIGHT delivered the opinion of the court:

The appellee, H. W. Lightcap, brought five suits in ejectment in the circuit court of Mason county against tenants of the appellant, Lydia Bradley. Upon changes of venue the suits were transferred to Fulton county, where they were consolidated by agreement and appellant was substituted as defendant. The consolidated suit was for the recovery of six hundred and eighty acres of farm lands. Upon a trial before the court there was a finding and judgment in favor of appellant. Appellee brought the case to this court by appeal, and the judgment was reversed and the cause was remanded to the circuit court for further proceedings in accordance with the views expressed in the opinion then filed. (Lightcap *v.* Bradley, 186 Ill. 510.) The cause was re-instated in the circuit court and was again tried, resulting in a judgment against appellant. She took a new trial as provided by the statute, and then filed the bill in this case to enjoin the further prosecution of the ejectment suit. A demurrer was sustained to the bill, and appellant having elected to stand by the bill it was dismissed for want of equity, and she appealed.

The substantial averments of the bill are as follows: That on June 30, 1867, complainant was the owner of a mortgage given by Thomas B. Breedlove on twelve hundred acres of land in Mason county, including the six hundred and eighty acres involved in the ejectment suit, to secure $19,616; that Breedlove and wife conveyed the whole premises, subject to the mortgage, to Benjamin S. Prettyman, who on August 13, 1868, conveyed the six hundred and eighty acres to Absalom McCune, taking from McCune a trust deed on the same to E. G. Johnson, as trustee for complainant, to secure the payment of three notes for the sum of $5000 each, with interest at ten per cent., due in one, two and three years from date; that Prettyman

delivered said notes and trust deed to the agent of complainant in part payment of the Breedlove mortgage and she released said Breedlove mortgage; that on November 13, 1868, McCune and wife re-conveyed the six hundred and eighty acres to Prettyman; that
93 nothing was paid on the McCune notes and no taxes were paid on the land, and in 1871 she investigated and found the lands to be swampy and worthless, vacant and unoccupied; that she took possession and redeemed from tax sales and paid the current taxes, and at the March term, 1872, filed her bill in the circuit court of Mason county against Prettyman, McCune and others, alleging that she had been induced to accept the McCune notes by fraudulent misrepresentations as to the value of the lands, and praying the court to set aside the release of the Breedlove mortgage and foreclose the same upon the whole twelve hundred acres; that while said bill was pending, in the summer of 1872, complainant personally entered on said lands and employed Allison Breedlove to hold and look after the same for her, and put him in charge thereof, to rent them for pasture and cut hay from them; that said Breedlove took and held active possession of the property, putting up fences as they were needed to keep in stock, and cutting and selling hay, and continued in actual possession until 1878, when complainant leased the lands to John Coddington; that she gradually reduced the lands to cultivation and joined in forming a drainage district, by which they were thoroughly drained and became of great value as farming lands; that the bill filed in the circuit court was contested by Prettyman and was pending until 1879, when a decree adverse to complainant was rendered, decreeing the foreclosure of the McCune trust deed upon the six hundred and eighty acres instead of the Breedlove mortgage on all the lands; that the lands were sold under the decree by the master in chancery and were struck off to complainant for $10,000, leaving a deficit due from McCune of $21,000, which has never been paid; that the time allowed for redemption from the sale expired January 27, 1881, and no redemption was made; that she did not take out a deed on the certificate of purchase, but continued in the actual, adverse possession of the lands, and was in such possession when she filed the bill in this case; that after the expiration of the time for redemption she expended about $5000 in the drainage district, about $5000 in improvements and over $5000 in taxes on the property; that the trustee, E. G. Johnson, died intestate in June, 1885, and on June 11, 1894, his heirs sold the
94 lands at public sale, after notice as provided for in the trust deed, and they were struck off to complainant for $35,000, and said heirs-at-law conveyed the same to her in conformity with the power in the trust deed, and that on November 30, 1894, there was put on record a quit-claim deed of said lands from Benjamin S. Prettyman to the defendant, purporting to have been executed on September 4, 1895. The bill gives the history of the ejectment suit, and alleges that complainant has fully presented her defense at law and has no remedy by the rules of law, and can

only have relief in equity. The prayer of the bill is, that the defendant be permanently enjoined from further prosecuting the action of ejectment or asserting ownership of the lands or entering upon or taking possession thereof; that he be required to convey to complainant all his right, title and interest in the same, and that her right to the lands may be confirmed and established by a decree of the court.

In seeking a reversal of the decree of the circuit court, counsel say that they present and rely upon the following four propositions:

"(1.) Complainant entered into possession of the premises as equitable mortgagee, and is entitled to retain possession until she has received satisfaction of her debt.

"(2.) Complainant has equitable title to the premises, the title having been conveyed to Johnson for her use, as the owner of the debt, her possession having been taken to enforce the conditions of the trust, the foreclosure having determined her equitable title and right to have the premises sold to satisfy her debt, the sale and subsequent expiration of the period of redemption having given her a right to demand the conveyance of the legal title. Possession with absolute right to have the legal title is equitable title. Having once acquired this, and never forfeited or conveyed it, complainant is the equitable owner.

"(3.) Defendant is estopped to claim the premises. From August, 1872, to July 13, 1895, he and his grantor, having then all the title they claim now, stood by and witnessed the development of the premises from a swamp, worth, at most, $6800, to valuable farms, worth, at least, $40,000, without asserting their claim.

"(4.) The statute of 1872 is unconstitutional in so far as it declares complainant's certificate null and void. She is entitled to the
95 benefit of the limitation laws as they were at the date of her mortgage, and to be judged by the law as then promulgated by the courts."

The fourth of these propositions has already been directly disposed of by decisions adverse to it in Ryhiner *v.* Frank, 105 Ill. 326, and also in Bradley *v.* Lightcap, 201 *id.* 511, on the second appeal in the ejectment suit. The limitation act of 1872 being valid and constitutional, is equally binding upon the court in this case as in the action at law. Furthermore, if that act, which limits the life of a certificate of purchase and the rights of a purchaser thereunder to five years after the expiration of the period of redemption, were unconstitutional, or if the construction given to it rendered it unconstitutional, a defense upon that ground would be complete and adequate at law, and the unconstitutionality of the act would be no ground for a bill in equity. Complainant could not maintain her bill to have that question determined, since the circuit court, in the action of ejectment, would have full power to pass upon it and award to complainant all her rights. The constitutionality of the statute is now beyond question, and the only duty of the court is to enforce it according to its terms. Courts do not hesitate to execute the legislative will as expressed in statutes of limitation, or try to demonstrate

a hidden meaning or intention not expressed in the statute or contrary to its terms, for the purpose of defeating it. Mr. Justice Story, speaking of former efforts of that kind, said in Spring *v.* Gray, 5 Mason, 505: "Happily that period has passed away, and judges now confine themselves to the more appropriate duty of construing the statute rather than devising means to evade its operation."

The language of this statute is clear and unambiguous. Plainer terms could not have been employed for the purpose of setting bounds to the rights acquired by a certificate of purchase and limiting them to five years after the period of redemption. The statute was so construed in Peterson *v.* Emmerson, 135 Ill. 55. The court, in the absence of express legislation on the subject, had formulated in Rucker *v.* Dooley, 49 Ill. 377, an equitable rule based upon the analogies of the law, and it was urged upon the court that equity might order a conveyance based on a foreclosure sale after the certificate was barred. The court, speaking by Mr. Justice Baker, said (p. 60): "But this rule was abrogated by the legislative enactment of 1872, not only in respect to the period of limitation, but
96 also by the provision that if a deed was not taken out within the time limited the certificate should be null and void. It is sticking in the bark to say that, notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree, by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute and an infringement of vested legal rights." In that case the purchaser asking relief was in possession. The statute was enacted because the legislature were not satisfied with the limitation fixed by the court in Rucker *v.* Dooley, either in respect to the period of eight years and three months, or the power of a court to give effect to the certificate after that time, within twenty years. If they had been satisfied with the rule of the court in either respect they would not have changed it in both. The statute fixed the limitation at five years, and abrogated the rule that the purchaser should have any right after that time, by declaring that the certificate should be null and void. The court had not annexed any qualification to its rule respecting possession, and no exception on that ground was incorporated in the statute. Some statutes of limitation fix limits for the commencement of actions for the possession of real estate, and one who is in possession is not subject to such limitation because he could not bring an action and already has what would be gained by a suit for possession. An argument that such a statute does not apply to one in possession is without force in the construction of a statute like this one. The effect of possession as notice, or as relating to the doctrine of *laches* in courts of equity, has no relation whatever to the question.

There is nothing, in principle, in this statute or this case differing from any other statute of limitations or any case where substantial rights are lost under such a statute. When the complainant pur-

chased the lands she was engaged in enforcing the remedies given to her by the law. The statute under which she purchased provided exactly what her purchase should be, what she should obtain by it, within what time she would be entitled to receive the title, and after what time the certificate of purchase would become null and void and all her rights under the purchase would cease.
97 The statute gave her a right to receive the amount of her bid, with interest in case of redemption, and in case there was no redemption, to receive a deed within five years after the expiration of the period of redemption, and declared that if she did not take out the deed within that time the certificate should be null and void. If she failed to observe the requirements of the statute the fault is solely hers, against which equity is powerless to relieve her. The statute does not transfer any right or title granted by the certificate of purchase or divest complainant of it, but it fixes, in definite terms, what she purchased. The ultimate effect of statutes of limitation, generally, is to extinguish rights, and the courts have not hesitated to enforce such statutes where the effect is to transfer title from the true owner. When the bar of the statute has become absolute it is just as available for attack as for defense, and in case of disseizin by the paramount owner the title acquired by the bar may be asserted against him. One having no other title to land except under a statute of limitations may maintain his action against the one who has lost title by the same statute. McDuffee *v.* Sinnott, 119 Ill., 449; Faloon *v.* Simshauser, 130 *id.*, 649; Illinois Central Railroad Co. *v.* Moore, 160 *id.*, 9.

Under the first of the propositions of counsel above stated, they insist that complainant is a mortgagee in possession,—and if that were so it would be a good defense at law. They say that, inasmuch as the trustee, Johnson, held title for her benefit and she entered into possession, although her certificate of purchase became null and void and the rights given to her as a purchaser ceased, her former status as a mortgagee in possession remains, and she is entitled to be considered in a court of equity as an equitable mortgagee in possession. The bill alleges, in a general way, that she took possession of the lands in 1871 and filed her bill to the March term, 1872, but alleges as a fact that while the bill was pending, in the summer of 1872, she personally entered on the lands and took possession and put an agent in charge of them. The bill is to be construed most strongly against the pleader, and it shows that she took actual possession after she had filed the bill. But that question is immaterial in this controversy. She had the right of a mortgagee to the possession of the lands under the trustee and could have recovered such possession in his name
98 for her benefit, but such right to possession ended when the land was freed from the lien of the trust deed. The title in the trustee was only for the purpose of obtaining satisfaction of the notes out of the lands. (Lightcap *v.* Bradley, 186 Ill. 510; Ware *v.* Schintz, 190 *id.* 189.) After condition broken she might pursue all the different remedies allowed by the law until satisfaction was

obtained by one or the other, but when a decree of foreclosure was entered and the land was sold, the security had been appropriated towards the satisfaction of the debt and all her rights in the land merged in the decree and sale. (State Bank *v.* Wilson, 4 Gilm. 57; Wayman *v.* Crozier, 35 *id.* 156; Seligman *v.* Laubheimer, 58 *id.* 124; Kelgour *v.* Wood, 64 *id.* 345; United States Mortgage Co. *v.* Gross, 93 *id.* 483; Ogle *v.* Koerner, 140 *id.* 170; Davis *v.* Dale, 150 *id.* 239; Walker *v.* Warner, 179 *id.* 16; Lightcap *v.* Bradley, 186 *id.* 510.) After the sale the trustee had no title, and nothing remained of the indebtedness except the personal liability of McCune. The title that the trustee had was only for the purpose of enforcing the provisions of the trust deed, and that having been done by the court, his powers, rights and duties were at an end. It is true, that during the period of redemption the court might have appointed a receiver to hold possession and apply the rents and profits on the deficit; but that is an equitable remedy in the nature of an equitable execution, and it was not done. If a foreclosure sale ripens into title it relates back to the execution of the mortgage and conveys all the title which the mortgagor then had, so as to cut off all subsequent encumbrances. But when the decree was entered and sale made the trust deed had expended its force. In Smith *v.* Smith, 32 Ill. 198, the court said (p. 202): "If the party elected to sell under the power or to foreclose in chancery, he could only sell or foreclose for the amount then due according to the terms of the mortgage; and this, of necessity, would be a release of the security for the amount not due." In Rains *v.* Mann, 68 Ill. 264, it was held that a foreclosure for a part of a debt released the lien of the mortgage for the balance. If Prettyman or a judgment creditor had redeemed, he would have held the title to the land discharged of the trust deed and all claims of the complainant, although there was an unpaid balance due from McCune. The existence of such an unpaid balance did not give any right to enforce the mortgage lien against the same property a second time. If another person than the complainant had purchased at the sale and obtained possession we apprehend that no one would say that he was a mortgagee in possession, and it cannot be different merely because she was the purchaser. The sale created a new relation, in no manner affected by the fact that complainant had been the party secured by the trust deed, but dependent upon the statute, which permitted any person to become the purchaser and admitted all as bidders on terms of absolute equality.

99

The second proposition is, that the complainant has equitable title to the premises through the trust deed, the sale and the expiration of the period of redemption, which gave her a right to a master's deed. It is argued that after the expiration of fifteen months the right of redemption of Prettyman and his creditors was gone, and that right being barred he had no title, but that the complainant is the equitable owner, although the certificate became null and void. If the title of Prettyman passed out of him at the expiration of the period of redemption it must have gone somewhere. It was not

in nubibus, and it did not go to the complainant or any other person The certificate of purchase conveyed no title to the complainant. Johnson *v.* Baker, 38 Ill. 98; Rockwell *v.* Servant, 63 *id.* 424; Huftalin *v.* Misner, 70 *id.* 55; Hays *v.* Cassell, *id.* 669.

In Whiting *v.* Butler, 29 Mich. 122, the four justices were divided in opinion and the judgment was affirmed under the statute. Three opinions were delivered by different justices, and Mr. Justice Christiancy concurred in the opinion delivered by Mr. Justice Cooley. There was a sale on execution of an interest in certain lands and a subsequent sale of the same interest on another execution. Those justices were of the opinion that the title under the second sale was paramount, and that while it was true that the execution debtor's title after the expiration of the period of redemption would have been a mere legal title, with the whole equitable right in the purchaser, such title did not terminate with the failure to redeem, but would continue, either at the will or through the mere inaction of the purchaser at the sale, indefinitely; that the owner had something very much beyond the mere right to redeem; that he had the legal title, and might sell and convey it, mortgage and lease the premises and defend his possession, and those rights would not be forfeited or lost by failure to redeem, and that the purchaser's right to the premises would only be perfected so as to divest the legal title and enable the purchaser to demand possession when the sale should be carried into effect by the execution of a deed.

The title must remain in the original owner until it passes out of him by the execution of a deed; and this is a title for all beneficial purposes. The complainant had no right to the possession, the beneficial use or the rents and profits, as purchaser or by virtue of the certificate, and the court would have had no power to award possession to her. (Bennett *v.* Matson, 41 Ill. 332; Myers *v.* Manny, 63 *id.* 211.) In Cochran *v.* Fogler, 116 Ill. 194, it was held that a purchaser was not entitled to possession until he had obtained a master's deed and complied with the terms of the decree by producing the deed and a certified copy of the order confirming the sale, and before that he could not call upon the mortgagor to surrender possession. The complainant's decree, under which she purchased, (a copy of which is annexed to the bill,) provided for the execution of a deed to the purchaser in the usual way, and that upon the execution and delivery of the master's deed the purchaser should be let into the possession of the premises conveyed to him, and that upon the production of the master's deed of conveyance and a certified copy of the order of the court confirming the sale, the person in possession should surrender the possession thereof to the grantee. Complainant had no right to the possession after the sale by virtue of the law, and her bill alleges none by virtue of any agreement. It is true, as was said in Whiting *v.* Butler, *supra*, that one who is entitled to a deed of premises has an equitable right in them; but that equitable right arises out of the fact that such person is entitled to the deed. In Wright *v.* Douglass, 2 N. Y. 373, the in-

terest of a purchaser at execution sale was levied on by writ of attachment. There was a judgment in the attachment suit and a sale and a deed was executed, and it was held that the purchaser at the execution sale had an interest in the premises, and that the sale on attachment was at least equivalent to the assignment of the certificate. A sheriff's deed was executed under the execution sale, and the interest, legal and equitable, of the purchaser at that sale was bound by the attachment. In Ketchum *v.* Schicketanz, 73 Ind.
101 137, the rights of a wife were involved. In Indiana a surviving wife is entitled to one-third of all lands in which her husband had any equitable interest at the time of his death, and the inchoate interest vests absolutely in her when such lands are sold and conveyed away from him under some judicial proceeding, the same as at his death. Marie Schicketanz was the wife of Jacob Schicketanz, and he had a certificate of purchase under a decree of foreclosure. He assigned it to his son, George, in fraud of creditors and of the bankrupt act, and George obtained the deed. Jacob being adjudged a bankrupt, the assignment to the son was set aside and a conveyance to the assignee in bankruptcy was ordered. It was held that in legal contemplation the lots conveyed were a part of Jacob's estate, and that the conveyance to the assignee in bankruptcy was under a judicial proceeding, so that one-third vested in the wife. In these cases the party who was held to have an interest in the lands was entitled to a deed, and the deed was executed. After the expiration of the period allowed for redemption the complainant in this case became entitled to a deed, and that right continued for five years, during which time she might have obtained a deed, but when that time expired and her certificate of purchase became null and void, the only ground for holding that she had equitable title to the premises ceased to exist.

This court has repeatedly held that the holder of a certificate of purchase barred by the statute has no interest, either at law or in equity. It was so held in Peterson *v.* Emerson, *supra;* and in Seeberger *v.* Weinberg, 151 Ill. 369, where a certificate of purchase had become void under the statute, it was held that the holder had no remedy which he could assert upon the certificate, as that had become a nullity, and he could not enforce any remedy on the original mortgage, as that remedy had been completely exhausted by the foreclosure and sale. The court said (p. 380): "Whether the lapse of time is to be given the effect of extinguishing his right or of merely barring his remedy, he has no further title or interest in the premises described in the certificate, which either he or his grantee can enforce, either at law or in equity." Brown *v.* Ridenhower, 161 Ill. 239, was a case like this, where the complainants, holding under a regular series of conveyances from the pur-
102 chaser at a special commissioner's sale under a decree of foreclosure, were in possession and filed their bill to set aside as clouds upon their title the deeds made by heirs of the original mortgagor. It was held that the complainants had no interest in the premises which could be enforced in equity,

There is no pretense that complainant is entitled to the legal title or to a conveyance of it, but the claim is that two estates are to run along, side by side, permanently in this land, the legal title in the defendant and the equitable title in the complainant. We have been referred to no authority which holds that in the absence of an express active trust the two estates can be permanently separated in that way. In the case of express passive trusts the use is executed by the statute and the legal title transferred to the person who has the beneficial estate, and the general rule is, that wherever one has an equitable estate and there is no active trust he is entitled to a transfer to him of the legal estate. In this case there is no trust, expressed or implied, resulting or constructive. Defendant's title is a perfectly valid, legal title and not a mere cloud to be canceled and removed. It has not become void, but the certificate of purchase under which complainant claims is void. Complainant has no title to the premises under her purchase and the bill shows no right to possession, and we do not see how it can be said she has an equitable estate in the land.

There is nothing alleged in the bill which amounts to an equitable estoppel. All that is alleged is silence on the part of Prettyman and no representation of a falsehood. Where silence is the ground of estoppel, it is essential that the party estopped shall have knowledge of the facts and the other party be ignorant of the truth, and be misled into doing that which he would not have done except for such silence. Complainant took no deed and is chargeable with knowledge of that fact, and there is no allegation that Prettyman knew it. She had the means of ascertaining Prettyman's title by reference to the public record, and the facts alleged do not create an estoppel. Thor *v.* Oleson, 125 Ill. 365; Mullaney *v.* Duffy, 145 *id.* 559; Holcomb *v.* Boynton, 151 *id.* 294.

The decree of the circuit court is affirmed.

Decree affirmed.

Mr. Justice HAND, dissenting:

103 This was a bill in chancery filed in the circuit court of Fulton county by the appellant, against the appellee, to enjoin the prosecution of an ejectment suit pending in that court for the recovery of 680 acres of farming land, located in Mason county. The ejectment suit was originally commenced in Mason county and on change of venue was transferred to Fulton county, where, upon a trial before the court, a jury having been waived, there was a finding and judgment in favor of the defendant. The plaintiff prosecuted an appeal to this court, and the judgment was reversed and the cause remanded, and on a re-trial in the circuit court a judgment was rendered against the defendant, and a new trial was taken by her under the statute, and she then filed this bill. A demurrer having been sustained thereto, and she having elected to stand by her bill, the same was dismissed for want of equity, and she has brought the same direct to this court by appeal, on the

ground that a freehold and the constitutionality of a statute are involved.

The bill avers that on June 30, 1867, the appellant was the owner of a mortgage given by Thomas B. Breedlove to secure the payment of the sum of $19,616 on 1200 acres of land situated in Mason county, of which the land in question was a part; that after that date Thomas B. Breedlove conveyed all of said premises, subject to said mortgage, to Benjamin S. Prettyman; that on August 13, 1868, Benjamin S. Prettyman conveyed 680 acres of the premises covered by said mortgage, being the premises in controversy, to Absalom McCune; that on the same day Absalom McCune executed to E. G. Johnson, as trustee, a trust deed upon said 680 acres to secure the payment of his three promissory notes, for the sum of $5000 each, due and payable to the order of the appellant in one, two and three years from date, with interest at ten per cent. per annum; that Benjamin S. Prettyman delivered said promissory notes to the appellant in part payment of the Breedlove mortgage and paid to her the balance thereof in cash, and she thereupon released the mortgage; that on November 13, 1868, Absalom McCune re-conveyed said 680 acres to Benjamin S. Prettyman; that at the time the appellant accepted the McCune notes and released the
104 Breedlove mortgage, Benjamin S. Prettyman represented to her that the 680 acres of the 1200 acres upon which she retained a lien was good farming land and much more valuable than the land she released, and that Absalom McCune was financially responsible; that she was not acquainted with the financial responsibility of McCune and had never seen the land, but relied upon the statement of Benjamin S. Prettyman with reference thereto; that in 1871, the interest upon the McCune notes not having been paid and the land having been sold for taxes, she discovered, upon investigation, that the 680 acres upon which she had retained a lien for the unpaid balance of the Breedlove mortgage was a swamp and of little value; that the 520 acres which she had released was valuable farming land; that McCune was not financially responsible and had left the State, and that the land was vacant and unproductive; that she thereupon, through her agent, entered into possession of the 680 acres as mortgagee, redeemed the same from the tax sales and paid up the back taxes thereon, and filed a bill in chancery in the circuit court of Mason county to set aside the release of the Breedlove mortgage on the ground of fraud and to foreclose the same, and subject to the payment of her debt the 1200 acres of land covered by it; that after protracted litigation she was defeated in her efforts to set aside the release of the Breedlove mortgage; that at the August term, 1879, of the Mason county circuit court, in the suit commenced to set aside the release and foreclose the Breedlove mortgage, a decree was entered foreclosing the Johnson trust deed, and a sale of the 680 acres covered thereby was ordered to satisfy the McCune notes, which then amounted to $31,500; that said 680 acres were sold by the master in chancery, under the decree, to the appellant on October 27, 1879, for $10,000, and the

master executed to her a certificate of purchase, as provided by the decree; that the master reported the sale to the court, and his report was approved and the sale confirmed on November 23, 1879: that appellant had been in the continuous possession of the premises from the year 1871 up to the time of the filing of the bill, and had paid all taxes assessed thereon during that time: that she had expended, with the knowledge of the appellee and Prettyman, a large amount of money in erecting fences, barns and dwelling houses,
105 the premises now being divided into three farms with substantial improvements upon each; that she had constructed drains and ditches upon the land, and re-claimed it from overflow, at great expense to her; that at the time she took possession of the land, in 1871, and at the time of the master's sale, the entire tract was not worth to exceed $6800 and that the same is now worth not less than $40,000, and that said increased value is due to the expenditure of money thereon by the appellant in draining and reclaiming said land and from the improvements placed thereon by appellant; that no redemption from the master's sale, upon the foreclosure of the Johnson trust deed, was ever made, and that the appellant never surrendered her certificate of purchase and took out a master's deed; that the trustee, E. G. Johnson, died intestate in 1885; that in 1894 the appellant applied to his widow and heirs to sell the premises under the power conferred on the trustee by the trust deed; that the premises were sold by them and the appellant bid therefor $35,000, and on June 11, 1894, they executed to her a quit-claim deed, reciting the trust deed and the sale made by them, which deed purported, upon its face, to convey to the appellant all the title of Absalom McCune in said 680 acres which he had at the time of the execution of the trust deed and the title thereby conveyed by him to said trustee.

In the ejectment suit the plaintiff claimed title in fee simple to the 680 acres, and the defendant filed the plea of not guilty. The fee title was admitted to be in Benjamin S. Prettyman on October 8, 1867, and the plaintiff, to maintain title in himself, introduced a deed for said lands from Prettyman and wife, dated August 13, 1868, to Absalom McCune; a deed from Absalom McCune and wife to Benjamin S. Prettyman, dated November 30, 1868, and a deed from Benjamin S. Prettyman to the plaintiff, dated September 4, 1893, all of which were duly acknowledged and recorded, the consideration in the deed from Benjamin S. Prettyman to plaintiff being $1000, and the defendant, to maintain title in herself, introduced in evidence the trust deed from Absalom McCune to E. G. Johnson, dated August 13, 1868, and in addition thereto relied upon the facts above set forth, except the evidence then showed her possession to date from about the year 1880, instead of 1871, as is averred in the
106 bill. It is averred that the appellant cannot produce any other or further testimony upon the trial of the ejectment suit when it shall be tried, to show title in herself.

This court, when the ejectment suit was here on appeal, held that

the legal title to the premises was in the plaintiff. The opinion filed in that case is reported as Lightcap *v.* Bradley, 186 Ill. 510.

The trust deed from Absalom McCune to E. G. Johnson was executed on August 13, 1868, and the legislature, on March 22, 1872, passed an act entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," which went into effect July 1, 1872, section 30 of which reads as follows: "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act the certificate of purchase shall be null and void, but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed." (2 Starr & Cur. Stat.—2d ed.—p. 2367.)

The appellant having failed to take out a deed on the sale to her under the foreclosure decree within five years from the expiration of the period of redemption, the certificate of purchase held by her became null and void; and the legal title to the premises never vested in her but remained in the appellee's grantor, and the question presented here for decision is,—the appellant being in possession claiming to be the equitable owner of the premises by virtue of the foreclosure and sale under the Johnson trust deed,
107 which sale was confirmed,—has she such an equitable interest in the premises, after the expiration of six years and three months from the date of sale, that a court of chancery will restrain, by injunction, appellee from disturbing her possession by ejectment or other proceedings at law?

The relation of the appellee's grantor and appellant to each other prior to the confirmation of the foreclosure sale was in the nature of that of mortgagor and mortgagee, and as against the grantor of appellee, Johnson, as trustee, held the fee title to the premises in controversy for the benefit of the appellant. He held the title, however, only for the purpose of securing the payment of the indebtedness due the appellant, and when that was paid or otherwise satisfied his title became extinguished by operation of law.

In Ware *v.* Schintz, 190 Ill. 189, which was an action of ejectment by the trustee in a trust deed, for the use of the holder of the indebtedness, to obtain possession as against the maker of the trust deed, on page 193 it was said: "The relation of plaintiff and defendant to

each other is that of mortgagor and mortgagee, and under the repeated rulings of this court a mortgagee, as against the mortgagor, is held, as in England, in law, to be the owner of the fee, having the *jus in re* as well as *ad rem*, and entitled to all the rights and remedies which the law gives to such owner, and may, after condition broken, maintain ejectment against the mortgagor. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons excepting the mortgagee or his assigns. (Delahay *v.* Clement, 3 Scam. 201; Vansant *v.* Allmon, 23 Ill. 26; Carroll *v.* Ballance, 26 *id.* 9; Oldham *v.* Pfleger, 84 *id.* 102; Fountain *v.* Bookstaver, 141 *id.* 461; Esker *v.* Heffernan, 159 *id.* 38.) The fee title held by the mortgagee is in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid or becomes barred by the statute of limitations the mortgagee's title is extinguished by operation of law. (Pollock *v.* Maison, 41 Ill. 516; Harris *v.* Mills, 28 *id.* 44; Gibson *v.* Rees, 50 *id.* 383; Barrett *v.* Hinckley, 124 *id.* 32; Lightcap *v.* Bradley, 186 *id.* 510.) Until it is extinguished the legal title is in the mortgagee for the purpose of obtaining satisfaction of his debt."

108 When the indebtedness secured by the trust deed became due, there were open to the appellant several remedies to enforce the payment of her debt: she could bring assumpsit upon the notes, put herself in possession of the land after condition broken, by ejectment, if necessary, that the rents and profits might be applied to the payment of her debt, or file a bill for foreclosure and sale, and under special circumstances she might have proceeded by *scire facias* or for a strict foreclosure. These remedies were cumulative, and either or all of them might have been pursued at the same time, until her debt was satisfied. (Vansant *v.* Allmon, 23 Ill. 26; Rogers *v.* Meyers, 68 *id.* 92; Harper *v.* Ely, 70 *id.* 581.) In Vansant *v.* Allmon, *supra*, on page 30 it was said: "A creditor by note and mortgage has several remedies, either and all of which he may pursue until his debt is satisfied. He may bring his action upon the note, or put himself in possession of the rents and profits by an ejectment after condition broken, or, if the mortgage be recorded, proceed by *scire facias* on the record and obtain a judgment to sell the land; or he may file his bill in chancery for a strict foreclosure of the equity of redemption, which courts will allow under a proper state of circumstances, or file a bill for foreclosure and sale, which is the usual practice in this State."

The appellant entered into possession of the land with a view to apply the rents and profits in payment of her debt, and at the same time proceeded in equity to foreclose the trust deed and sell the land. While she might thus proceed she could have but one satisfaction, and when a decree of foreclosure and sale was entered and the land was sold and the sale confirmed, the mortgage was exhausted and all the rights of appellant in the land merged in the decree and sale. State Bank *v.* Wilson, 4 Gilm. 57; Wayman *v.* Crozier, 35 Ill. 156; Seligman *v.* Laubheimer, 58 *id.* 124; Kelgour *v.* Wood, 64 *id.* 345;

United States Mortgage Co. *v.* Gross, 93 *id.* 483; Ogle *v.* Koerner, 140 *id.* 170; Davis *v.* Dale, 150 *id.* 239; Walker *v.* Warner, 179 *id.* 16.

In the ejectment case (Lightcap *v.* Bradley) the foregoing authorities were reviewed, and on page 524 it was said: "A decree was entered in pursuance of the prayer of her bill, ordering a sale of the premises, which was duly made and she became the purchaser. Having made her election and secured a valid sale of the property she must abide by it. (State Bank *v.* Wilson, 4 Gilm. 57.)
109 The cause of action was merged in that foreclosure and sale, and all the rights and liabilities growing out of the trust deed were transferred to the decree. When a mortgage is foreclosed by suit the decree of the court becomes the basis of title. (United States Mortgage Co. *v.* Gross, *supra.*) By the decree and the execution thereof, the legal liability was transferred to the decree. The debt was merged in the decree, and the rights and liabilities growing out of the trust deed were fixed by such decree and to be enforced through its provisions. (Wayman *v.* Cochrane, 35 Ill. 151.)

"It is insisted by counsel that the title conveyed to Johnson could not merge in the decree; and perhaps the doctrine of merger does not strictly apply, but the title which Johnson had was only available for the collection of the notes, and they were merged in the decree. The defendant had asked and obtained a decree for the enforcement of her rights in another manner and by another means. Whether the doctrine of merger applies or not, the sale of the premises under the decree exhausted all the rights and remedies under the trust deed, and the title which had been in the trustee was sold by the court. (Kelgour *v.* Wood, 64 Ill. 345; Walker *v.* Warner, 179 *id.* 16.) In Seligman *v.* Laubheimer, 58 Ill. 124, the court said (p. 126): 'Without determining the legal effect of the mere foreclosure, we do hold that the decree, followed by a sale of the premises, the purchase, and the subsequent acts of the first mortgagee, extinguished his mortgage lien. * * * Plaintiff in error obtained his decree, caused a sale, became the purchaser, received his certificate of purchase, and then procured an award for a special execution to make the residue of his debt. By these acts the mortgage lien was extinguished. The intention to merge the lien is clearly deducible from them.' In Ogle *v.* Koerner, 140 Ill. 170, the court said (p. 179): 'A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose and
110 the property is no longer subject to it.' In Davis *v.* Dale, 150 Ill. 239, the law was again stated as follows (p. 243): 'By virtue of the lien created, the mortgagee or *cestui que trust* had the right to have the security foreclosed and the property sold and the

proceeds applied in payment of the secured debt. But when this has been done, and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force and the property is no longer subject to its provisions. (Ogle *v.* Koerner, 140 Ill. 170; Seligman *v.* Laubheimer, 58 *id.* 124.) Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or *cestui que trust* or not. By becoming the purchaser a new relation created by the statute exists, in nowise dependent upon any privity of contract between the purchaser and mortgagor.'"

From a consideration of the authorities the conclusion is irresistible that the foreclosure and sale divested the appellant of all the rights which she had in the premises under the trust deed, and that after the confirmation of the sale she had no right to hold the premises longer, as mortgagee or *cestui que trust* in possession, without the consent of the grantor of appellee or through a receiver, as the debt, as an incident to the trust deed, was satisfied and discharged, and the land being released from the lien created by the trust deed, the right to retain the possession thereof for the purpose of satisfying the mortgage debt was gone. The confirmation of the sale, however, created a new relation, and from that time until the equity of redemption expired the only rights of the appellant, growing out of the foreclosure and sale, were to have returned to her the amount of her bid, with interest, in case the premises should be redeemed from the sale, or in case no redemption should be made, to receive a deed of the land at the expiration of fifteen months from the date of sale, and to apply the rents and profits of the land during that period, by the consent of the maker of the trust deed or through a receiver, to the payment of the amount of the decree remaining unpaid after the application thereon of the amount of her bid, while during that time the grantor of appellee had the right to retain the possession of the premises and enjoy the use thereof, and to redeem from the foreclosure sale,
111 and in case of a redemption the title would have been in him freed from the debt. During the fifteen months allowed for redemption the appellant had only a lien upon the premises for the amount of her bid, with the inchoate right to a deed in case a redemption of the land from the sale did not take place, while the grantor of appellee was the owner of the land subject to the lien and had the right to redeem. So soon, however, as the right of redemption had expired the appellant became the equitable owner of the land with the right to take a deed, which would have invested her with the full title to the land, both equitable and legal, and the grantor of appellee had left remaining in him only the naked legal title to the land, which could have been divested by the appellant at any moment and without any act being performed by the grantor of appellee. All that was then necessary to complete her full title and ownership was the execution to her of a deed by the master. The master had no legal or beneficial interest in the land. He was simply a conduit through which, by virtue of a deed, the legal title

would pass from the grantor of appellee to the appellant. As the grantor of appellee at that time had only the legal title, all the equitable interest in the land was in appellant, and upon uniting the legal title and equitable interest in her by a master's deed, her title would have been consummated and become complete.

In Stephens *v.* Illinois Mutual Ins. Co. 43 Ill. 327, the court had under consideration the question whether or not the mortgagor had an insurable interest in the mortgaged property after foreclosure and sale during the time allowed for redemption, and it was said (p. 331): "At the time of the fire, then, the position of Stephens was substantially that of a mortgagor, with a right to redeem. * * * That in this position he would have had a substantial, insurable interest does not admit of doubt. His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this State the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien in order to cut off intervening encumbrances, but it will not carry back the absolute divestiture of title, as is evident from
112 the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time."

The case of Whiting *v.* Butler, 29 Mich. 122, is very instructive upon the questions of the respective rights of the judgment debtor and purchaser in premises sold upon execution after the term of redemption has expired. Opinions were filed by four different members of the court. Mr. Justice Cooley on page 129 says: "After Drury had become entitled to a sheriff's deed, Campau's title would have been a mere legal title with the whole equitable right in Drury." And Mr. Justice Campbell on page 143 said: "The Drury title became an indefeasible right as soon as the statutory period of fifteen months expired. * * * The interest which Drury obtained by his execution sale was a vested and valuable interest. * * * Though not the legal estate, it was an equitable estate."

Jones, in his work on Mortgages, (vol. 2, sec. 1661,) in speaking of the rights of parties after sale, says: "The mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time."

In Ketchum *v.* Schicketanz, 73 Ind. 137, it was held that with the expiration of the time allotted for redemption the holder of a sheriff's certificate for land sold on execution or decretal order acquires an

equitable estate in the land, of which one-third will pass to the wife upon the bankruptcy of the husband under the statute of that State, which provides that the surviving wife shall have a one-third interest in all the lands in which the husband had an equitable interest at the time of his death, and that her inchoate interest in his lands shall vest absolutely where the same are conveyed away from him, under judicial proceedings.

In Wright *v.* Douglass, 2 N. Y. 373, it was held the interest of a purchaser at an execution sale after the time of redemption had expired becomes an estate subject to sale upon attachment.

113 It seems clear that the equitable estate in said lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal title thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought ejectment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession, during the period of redemption, was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked legal title. As was said in Whiting *v.* Butler, *supra* (p. 139): "His right to a deed had become complete and vested. All he lacked of a legal title to the land, superior and paramount, was the legal evidence such a deed would afford, and his right to this evidence or muniment was not contingent,—not dependent upon the will or discretion of any one. It was so complete that it was not necessary for him to resort to equity to obtain it if withheld. The right to it was so plainly and exclusively fixed and legal as to be cognizable at law and enforceable by *mandamus*,"—and in this State the appellant could have obtained the relief by motion. People *v.* Bowman, 181 Ill. 421.

Under the repeated decisions of this court it is clear that, by virtue of the terms of the statute above referred to, upon the failure of the appellant to take out a deed within the time fixed therein, the certificate of purchase issued to her became null and void and that no right could be predicated thereon by her. (Ryhiner *v.* Frank, 105 Ill. 326; Peterson *v.* Emmerson, 135 *id.* 55; Belleville Savings Bank *v.* Reis, 136 *id.* 242; Seeberger *v.* Weinberg, 151 *id.* 369; Brown *v.* Ridenhower, 161 *id.* 239.) The appellant, however, is not claiming any right here by virtue of the certificate of purchase, but being the equitable owner of the premises by virtue of the decree of foreclosure, the sale and the decree confirming the sale, and being in possession of the premises, the question is, should a court of equity permit her to be turned out of possession

114 by one who has only the mere naked legal title to the land? The statute requiring a deed to be taken out within five years

from the expiration of the period of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (Ryhiner *v.* Frank, *supra.*) The same rules of construction must therefore be applied to this statute that the courts have heretofore applied to statutes of limitation in general, and the law is well settled in this State that statutes of limitation do not run against a party while in possession of land. (Mills *v.* Lockwood, 42 Ill. 111; Wilson *v.* Byers, 77 *id.* 76; Parker *v.* Shannon, 137 *id.* 376.) In Parker *v.* Shannon, *supra*, the court said (p. 392): "A statute of limitations or rule of limitation in equity does not run against 'a possessor of real estate, but it runs against him who is out of possession.' (Mills *v.* Lockwood, 42 Ill. 111.) 'The possession is notice to all, of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.'" To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law and make it obnoxious to both the State and Federal authorities.

It would seem, therefore, that while the right to a master's deed had been swept away by the statute, the statute had no effect upon the equitable interest of the appellant, accompanied, as it was, by her possession; that the statute did not operate upon the interest here asserted by reason of her possession, and that it is beside the case to say that the statute has barred her right to a deed. The equitable estate of appellant in the land after the period of redemption had expired, arose, not out of the certificate of purchase, which amounted to no more than evidence of her bid and when the period of redemption would expire, but by reason of her bid, the application thereof upon the decree, and the fact that the appellee failed to redeem, and her possession.

It is, however, contended that this court is committed by numerous decisions to a view contrary to the view herein expressed. We think, upon a careful analysis of the decisions relied upon, it will be found that none of them are inconsistent with what is here said, and that no case can be found in our reports where the precise question presented here has been passed upon. In Ryhiner *v.* Frank, *supra*, the plaintiff brought ejectment to recover certain lots in Effingham, and as one source of his title relied upon a judgment rendered March 6, 1871, against their then owner, an execution sale of the lots on August 7, 1871, under the judgment, and
115 a sheriff's deed of them dated December 21, 1878, to him, as assignee of the certificate of purchase. The court held section 30 of the statute heretofore referred to, one of limitation, and valid, and as the sheriff's deed had not been taken out within the time limited by the statute, the certificate of purchase, on which the deed was given, had become null and void, and that the deed was of no effect. The case differs from the case at bar in that it was ejectment, where only legal titles are considered, and the purchaser was out of possession.

In Peterson *v.* Emmerson, *supra*, it appeared that a decree was

entered in 1871, to foreclose a mortgage (executed in 1865) upon forty acres of land. On November 25, 1871, the master sold the land to the complainant and issued to her a certificate of purchase. In 1872 she took possession of the premises and received the rents and paid the taxes, but failed to take out a master's deed until more than five years had elapsed after the period of redemption had expired. She afterwards filed a bill against the master and the heirs of the mortgagor, to procure a decree requiring the master to execute a deed to her of the land. The chancellor so decreed, but on appeal this court held that section 30 was a limitation law, and that as it affected only the remedy, it applied to the master's sale made prior to its passage, and under the ruling made in Ryhiner *v.* Frank, *supra*, more than five years having elapsed after the period of redemption had expired and no deed having been taken out, the certificate of purchase was null and void, and that the master was powerless then to issue a deed, and that the court had no power to direct him so to do. While the question here presented was not presented there, the court did incidentally consider the question, and while it was not expressly passed upon, Mr. Justice Baker, who wrote the opinion, used the following language with reference thereto (p. 60): "It does not alter the case that defendant in error has been in actual possession of the land since 1872, claiming ownership, and has paid all the taxes assessed thereon. Such acts do not so take the case out of the statute as to justify the transfer to her of the legal title vested in the heirs of the mortgagor. If she has gained any rights by virtue of such possession, claim of ownership and payment of taxes, the courts will, doubtless, if called upon, protect her therein; but surely the existence of such rights, if any there be, does not
116 afford just and equitable grounds for transferring to her a legal title to which she is not entitled under the law of the land." In that case the relief sought was the transfer of the legal title to the complainant, while here the relief sought is the protection of the appellant's equitable interest from the assault made against her possession by the holder of the legal title, by ejectment.

In Seeberger *v.* Weinberg, *supra*, Seeberger was the owner of three notes secured by a trust deed upon certain lots located in Chicago. Default having been made, the trust deed was foreclosed and the lots sold to him on February 14, 1876, and a certificate of purchase was issued to him. No redemption took place and no master's deed was ever issued. The property was vacant, and on June 22, 1892, the widow and heirs of the grantor in the trust deed conveyed the premises to William Kornell, who immediately conveyed the same to Fannie Weinberg, who took possession and gave a trust deed thereon to secure the sum of $6000, which she had borrowed from the Bank of Commerce of Chicago with which to improve the property. On September 17, 1892, Seeberger filed a bill, making Fannie Weinberg and husband, Hermann Felsenthal, as trustee, and Jacob Gross, his successor in trust, and the Bank of Commerce, defendants, and prayed for a decree requiring Fannie Weinberg and her hus-

band to execute and deliver to him a deed conveying to him the property, that his title to the lots be confirmed and that the trust deed be canceled and released of record. The court reiterated the doctrine that a deed not having been taken out within five years after the period of redemption expired, the certificate of purchase was null and void, and held that the bill could not be maintained. In that case the property remained vacant until it was taken possession of by the remote grantees of the widow and heirs of the grantor in the trust deed, and while in possession Fannie Weinberg mortgaged the property to the bank. At the time Seeberger filed his bill he was out of possession, while here the appellant has been in possession since 1871, and was in possession at the time the appellee obtained the legal title from Prettyman, and by reason of such possession had notice of all the equitable rights of the appellant.

In Brown *v.* Ridenhower, *supra*, the bill was filed by the grantee of the purchaser at a foreclosure sale, where no deed had
117 been taken out and where more than five years had elapsed subsequent to the expiration of the period of redemption, to set aside two quit-claim deeds upon the premises as a cloud upon the title of the complainant, executed by the original mortgagor and his grantee, and the court held that such bill could not be maintained. The relief prayed in this case was similar to the relief prayed in Peterson *v.* Emmerson, *supra*, and was not a bill, as here, to protect the possession of the complainant under an equitable title.

In the opinions in the foregoing cases are to be found expressions which, standing alone and considered by themselves and not in connection with the facts then before the court, would seem to extend section 30 of the statute far enough to cut off and bar the equitable interest of the purchaser at a master's sale, even where he was in possession, if a deed was not taken out within five years after the expiration of the period of redemption; but it was not necessary for the proper decision of any of those cases that the court should determine that question, and what is said in the opinions of the court in deciding them, by way of argument or illustration, that was not necessary to have been said for a proper determination thereof, is *obiter dicta*, and not controlling upon the court when a case arises where the question is squarely presented and is vital to a determination of the case then before the court. In Brown *v.* Coon, 36 Ill. 243, on page 246 Mr. Justice Lawrence said: "It is a familiar rule of criticism in regard to judicial decisions, that their authority arises from what the court *decides* in reference to the facts before it, rather than from what the judge who delivers the opinion may say in illustration and support of the ruling of the bench. When it is remembered that judges are often obliged to write a hundred opinions per annum, they would be more than human if they did not occasionally use expressions of a general character, which, while perfectly true in regard to the case before them, are at the same time incorrect when pushed to extremes or applied to a totally different state of facts." And in Mayer *v.* Erhardt, 88 Ill. 452, on page 457 Mr. Chief Justice Scholfield quotes with approval the language of Chief Justice Marshall in

Cohens *v.* Virginia, 6 Wheat. 399, where he said: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those ex-
118 pressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

From what has been said it is clear that appellant is the owner of the equitable—the full beneficial—interest in the premises sought to be recovered in the ejectment suit, but that the legal title must prevail at law, and that her equitable interest will be lost to her unless the prosecution of the ejectment suit is enjoined, as in that suit she cannot plead and prove her equitable interest as a defense. That a court of chancery has jurisdiction in such state of case to enjoin the prosecution of the ejectment suit is well settled by the authorities. (Bishop of Chicago *v.* Chiniquy, 74 Ill. 317; County of Cook *v.* City of Chicago, 158 *id.* 524; McCaa *v.* Woolf, 42 Ala. 389; Smith *v.* Spencer, 73 *id.* 299; McKibbin *v.* Bristol, 50 Mich. 319; Siemon *v.* Schurck, 29 N. Y. 598.) In Bishop of Chicago *v.* Chiniquy, *supra*, it is said the basis upon which a court of chancery enjoins the prosecution of an action of ejectment is, that the complainant "has some equitable defense which a court of law cannot take cognizance of, either by reason of want of jurisdiction or from the infirmity of legal process."

It is no answer to the position that a court of chancery should grant the relief prayer for in this bill, to say that the legal title to the premises in question will still remain in appellee. Although the legal title thereto will not, by the decree, be transferred to the appellant, the appellee will, after the decree is entered, be powerless to assert the legal title against the appellant or her successors in title. The effect of the decree will be to protect the appellant and her successors in title in the possession and enjoyment of the land. We have repeatedly held, where there is an outstanding title, and a bill is filed to remove it as a cloud upon the complainant's title, that the proper practice is to enjoin the assertion of such title against the complainant by the holder thereof, his heirs and assigns,
119 and not to decree the conveyance thereof to the complainant. Barnett *v.* Cline, 60 Ill. 205; Reed *v.* Reber, 62 *id.* 240.

From a careful examination of this record we have reached the conclusion that the equities of this case as presented by her bill are with the appellant and that the circuit court erred in sustaining the demurrer thereto.

Mr. Justice Boggs: I do not concur in the decision of this case.

120 STATE OF ILLINOIS, } ss:
Supreme Court, }

I, Christopher Mamer, clerk of the supreme court, of the State of Illinois, and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof, I have set my hand and affixed the seal of the said supreme court at Springfield, this 25" day of Ap'l, A. D. 1903.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

C. MAMER,
Clerk of the Supreme Court.

121 [Endorsed:] Supreme court. Lydia Bradley v. H. W. Lightcap. Opinion filed 24th day of April, 1903.

122 Supreme Court of the United States, April Term, 1903.

LYDIA BRADLEY, Plaintiff in Error, vs. H. W. LIGHTCAP, Defendant in Error. } Bill in Equity for Injunction and Relief. Error to Supreme Court of Illinois.

To the Honorable Benjamin D. Magruder, chief justice of the supreme court of Illinois:

Lydia Bradley, the complainant in said bill, and plaintiff in error respectfully petitioning, shows unto your honor that heretofore on the 24th day of April, A. D. 1903, the supreme court of the State of Illinois, being the highest court of the State of Illinois in which a decision in said suit could be had, made its final order in the above entitled cause, then pending therein upon appeal from the circuit court of Fulton county, and the same was entered of record, affirming the decree of said circuit court of Fulton county dismissing the bill of complaint filed therein by plaintiff in error for want of equity, as will appear in full by the certified copy of the record in said cause under the hand and seal of the clerk of the supreme court of the State of Illinois, submitted herewith.

And your petitioner shows that in and by said bill of complaint and by the said final judgment of the supreme court of the State of Illinois there was drawn in question the validity and constitutionality of a certain statute of the State of Illinois, to-wit: an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution and to provide for the redemption of real estate sold under execution or decree" approved
123 March 22nd, 1872, in force July 1, 1872, being section 30 chapter 77 of the Revised Statutes of the State of Illinois, on

the ground of its being repugnant to the Constitution of the United States and on the ground of its being repugnant to the laws of the United States, which statute, as construed and applied by the said supreme court of the State of Illinois, complainant alleged to be repugnant to the Constitution of the United States of America, and particularly to section 10 of article 1 of said constitution, and to section 1 article 14 of said constitution, and the decree of said circuit court and the final decision of said supreme court were in favor of the constitutionality of said statute.

And petitioner further shows that there exists in this case a controversy necessarily involving the construction of section 10 article 1 of the Constitution of the United States as applicable to said statute of the State of Illinois known as section 30 of chapter 77 Revised Statutes of Illinois, as the same was construed and applied by the trial court, and as the same is now construed and applied by the said supreme court of the State of Illinois, and that the decision of that question was necessary to the determination of said cause.

And petitioner further shows that there exists in this case a controversy necessarily drawing in question the construction of section 1 article 14 known as the fourteenth amendment of the Constitution of the United States, as applicable to said section 30 chapter 77 of the Revised Statutes of the State of Illinois, as the same was construed and applied by the trial court, and is now construed and applied by the supreme court of the State of Illinois, and that the decision of that question was necessary to the determination of said cause.

And petitioner further shows that in and by her said bill of complaint it was alleged and shown that she is a citizen of the
124 United States, and that the defendant in error, under color of a certain statute of the State of Illinois, viz: section 30 chapter 77 of the Revised Statutes of the State of Illinois, is seeking to deprive plaintiff in error of her rights, privileges and immunities secured by the Constitution and laws of the United States of America in and to certain real estate in said bill mentioned and described contrary to the statutes of the United States in such cases made and provided, to-wit, section 1979 of the Compiled Statutes of the United States of America, and the decision of the trial court was against the title, right, privilege and immunity, claimed by plaintiff in error under said statute, which decision has now been confirmed by the said supreme court of the State of Illinois, in and by its said final judgment.

And petitioner further shows that there exists in this case a controversy necessarily involving and drawing in question the construction of said statute of the United States of America, viz: section 1979 of the United States Compiled Statutes and a decision as to petitioner's rights, privileges and immunities under said statute of the United States, and said decision was against the rights, privileges and immunities claimed by petitioner.

And petitioner further shows that in and by her said bill of complaint it was alleged and shown that by the laws of the land as

established by the judicial decisions of the courts of last resort, in the State of Illinois, at the date of the trust deed to E. G. Johnson, trustee for plaintiff in error in said bill mentioned and described, the equitable title passed to plaintiff in error, and after breach of condition became absolute in her as against the mortgagor and his grantees; but that since the date of said trust deed the laws of the land in said State of Illinois have been so changed by judicial decisions of the courts of last resort in said State that it is now held and decided by the said supreme court of the State of Illi-
125 nois that the title so vested in plaintiff in error is a base and determinable fee which ceases and is terminated by operation of law when the debt secured by said trust deed is barred by the statute of limitations to-wit, the said statute known as section 30 chapter 77 Revised Statutes of the State of Illinois. And it was further alleged and shown in and by said bill of complaint that the law of the land as established in the State of Illinois at the date of said trust deed entered into and became a part of the contract and could not afterwards be changed so as to deprive plaintiff in error of her substantial rights or materially impair her remedies under said trust deed without violating the Constitution of the United States of America, particularly section 10 article 1 of said Constitution; and it was held and decided by the trial court that such change of judicial decision was not contrary to the Constitution of the United States, which decision has now been confirmed by the said supreme court of the State of Illinois in and by its said final judgment.

And petitioner further shows that there exists in this case a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America as applicable to the said change of judicial construction and the law of the land in the State of Illinois, and particularly of section 10 of article 1 of said constitution, and that the decision of that question was necessary to the determination of said cause.

And petitioner further shows that there exists in this case a controversy necessarily involving and drawing in question the construction of the Constitution of the United States of America as applicable to the said change of judicial construction and the law of the land in the State of Illinois, and particularly of the fourteenth amendment of said Constitution, and that the decision of that question was necessary to the determination of said cause.

126 Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States of America, addressed to the honorable justices of the supreme court of the State of Illinois, commanding them to transmit the record of their said proceedings to the Supreme Court of the United States of America, and that a citation may issue under the hand and seal of your honor, commanding said H. W. Lightcap defendant in error to be and appear in the said Supreme Court of the United States at Washington, D. C. within thirty days from the date thereof to show

cause if any there by why the said judgment of the supreme court of the State of Illinois should not be corrected.

And your petitioner will ever pray, etc.

JOHN S. MILLER,
MERITT STARR,
W. W. HAMMOND,
Solicitors for Petitioner.

LYDIA BRADLEY,
Per W. W. HAMMOND, *Sol.*

127 Supreme Court of the United States, April Term, 1903.

LYDIA BRADLEY, Plaintiff in Error, *vs.* H. W. LIGHTCAP, Defendant in Error. } In Chancery for Injunction and Relief. Error to Supreme Court of Illinois.

The foregoing petition and assignment of errors and record of said cause having been considered it is ordered

That a writ of error to said court be allowed and that the same be made a supersedeas, the plaintiff in error giving bond in the sum of $5000; which bond is presented herewith, the sureties being George W. Scott and Harry A. Hammond, and said bond and security have been and are approved.

In witness whereof I have hereunto set my hand this 18th day of May, A. D. 1903.

(Signed) BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of Illinois.

128 Know all men by these presents that we Lydia Bradley, of the county of Peoria and State of Illinois, as principal and George W. Scott and Harry A. Hammond, of the county of Stark and State of Illinois, as sureties, are held and firmly bound unto H. W. Lightcap in the penal sum of five thousand ($5000.00) dollars, for the payment of which, well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of May A. D. 1903.

The condition of the above obligation is such that whereas the said H. W. Lightcap did on the 24th day of April, A. D. 1903, at a term of the supreme court of the State of Illinois then being holden at Springfield, in said State, obtain a decree confirming the decree of the circuit court of Fulton county in said State of Illinois in a certain bill for injunction and relief wherein said Lydia Bradley was plaintiff and H. W. Lightcap defendant, and for costs of said suit, to review which decree the said Lydia Bradley has prayed and obtained a writ of error to the supreme court of the State of Illinois,

Now if the said Lydia Bradley shall duly prosecute said writ of error to effect and shall moreover pay the amount of said judgment together with all costs, interest and damages accruing to said H. W.

Lightcap by reason of such writ of error in case said judgment shall be affirmed, then the above obligation to be null and void, otherwise to remain in full force and virtue.

LYDIA BRADLEY. [SEAL.]
GEORGE W. SCOTT. [SEAL.]
HARRY A. HAMMOND. [SEAL.]

Approved by—
(Signed) BENJ. D. MAGRUDER,
Chief Justice of the Supreme Court of Illinois.

129 STATE OF ILLINOIS, } ss:
Stark County, }

George W. Scott and Harry A. Hammond being each duly sworn, on oath state, that they are residents of the county and State aforesaid, and that they are each of them the owners and possessors of property, in their own names and rights, free from incumbrances, and liable to execution, of the fair and reasonable value of not less than five thousand ($5000.00) dollars in real estate.

GEORGE W. SCOTT.
HARRY A. HAMMOND.

Subscribed and sworn to before me, this 11" day of May, A. D. 1903.

GEORGE S. RAKESTRAW,
Notary Public.

[NOTARIAL SEAL.]

130 STATE OF ILLINOIS, } ss:
County of Peoria, }

I, Clara E. Comstock, a notary public in and for the said county, in the State aforesaid, do hereby certify, that Lydia Bradley, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered said instrument as her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 11th day of May, A. D. 1903.

CLARA E. COMSTOCK,
Notary Public.

[NOTARIAL SEAL.]

STATE OF ILLINOIS, } ss:
County of Stark, }

I, George S. Rakestraw, a notary public in and for the said county, in the State aforesaid, do hereby certify that George W. Scott and Harry A. Hammond, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, ap-

peared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 11" day of May, A. D. 1903.

GEORGE S. RAKESTRAW,
Notary Public.

[NOTARIAL SEAL.]

131 Supreme Court of the United States, April Term, 1903.

LYDIA BRADLEY, Plaintiff in Error,
vs.
H. W. LIGHTCAP, Defendant in Error.

Bill in Equity for Injunction and Relief. Error to Supreme Court of Illinois.

Assignment of Errors.

And now comes Lydia Bradley, plaintiff in error herein, appellant in the supreme court of Illinois, and complainant in the circuit court of Fulton county, Illinois, by John S. Miller, Merritt Starr and W. W. Hammond her solicitors, and shows that in the record and proceedings and in the rendering of the judgment of the supreme court of Illinois in said cause as the same appears by the foregoing transcript thereof, there is manifest error in this, to-wit:

1. The said supreme court of Illinois in and by its said final judgment and decision erred in holding and adjudging a certain statute of the State of Illinois, to-wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree" approved March 22nd, 1872, in force July 1, 1872, being section 30 chapter 77 of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to section 10 article 1 of said Constitution, and in not holding said statute of the State of Illinois as construed and applied by the supreme court of Illinois in and by its said final judgment, unconstitutional and void under said section of
132 the Constitution of the United States of America.

2. Said supreme court of the State of Illinois erred in rendering its said final judgment in this; that said statute of the State of Illinois (more particularly described in the last foregoing assignment) as construed and applied to complainant's said mortgage contract, made and entered into prior to the enactment of said statute, by the said final judgment and decision of said supreme court of the State of Illinois, impairs the obligation of said contract, contrary to the provisions of the Constitution of the United States of America.

3. The said supreme court of Illinois in rendering its said final judgment and decision erred in holding and adjudging a certain

statute of the State of Illinois, to-wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree" approved March 22nd, 1872, in force July 1, 1872, being section 30 chapter 77 of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to section 1 article 14 being the fourteenth amendment of said Constitution, and in not holding said statute of the State of Illinois as construed and applied by the said supreme court of Illinois in and by its said final judgment, unconstitutional and void under said section of the Constitution of the United States of America.

4. The said supreme court of the State of Illinois erred in rendering its said final judgment in this; that said statute of the State of Illinois (more particularly described in the last foregoing assignment) as construed and applied by the said supreme court of the State of Illinois, in and by its said final judgment, deprives complainant of her property without due process of law, con-
133 trary to the provisions of the Constitution of the United States of America.

5. That said supreme court of the State of Illinois erred in rendering its said final judgment in this; that the said Lydia Bradley is thereby deprived of her property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States of America.

6. That said supreme court of the State of Illinois erred in rendering its said final judgment in this; in not deciding and adjudging said statute of the State of Illinois (more particularly described in the first assignment of error herein) as construed and applied to complainant's said mortgage contract, to be repugnant to the Constitution of the United States of America and the amendments thereto.

7. The said supreme court of the State of Illinois erred in rendering its said judgment in this; that in and by said final judgment sustaining the validity of said statute of the State of Illinois (more particularly described in the first assignment of error herein) said Lydia Bradley is denied the equal protection of the laws of the United States of America, contrary to the provisions of the Constitution of the United States of America, and particularly the fourteenth amendment thereto.

8. The said supreme court of the State of Illinois erred in holding and deciding that the allegations of complainant's bill showing that defendant was, under color of said statute of the State of Illinois, viz: section 30 chapter 77 of the Revised Statutes of the State of Illinois, seeking to deprive her of rights, privileges and immunities secured to her under the Constitution and laws of the United States of America, did not show a good and sufficient cause of action and good and sufficient grounds for equitable relief, particu-
134 larly under section 1979 of the Compiled Statutes of the United States of America, and erred in sustaining and affirm

ing the decree of the said circuit court of Fulton county dismissing said bill for want of equity, and in not reversing the said decree.

9. The said supreme court of the State of Illinois erred in rendering its said judgment in this; that in and by said final judgment of said court said Lydia Bradley is deprived of her rights privileges and immunities secured to her under the Constitution and laws of the United States of America contrary to the statutes of the United States of America, particularly section 1979 of the Compiled Statutes of the United States.

10. Said supreme court of the State of Illinois erred in adjudging and deciding that the change of judicial decision in the State of Illinois alleged by plaintiff in error to have taken place subsequent to the date of her mortgage contract, materially affecting her title, interest, rights and remedies under her mortgage contract has not taken place in the State of Illinois as alleged in said bill, and in applying the law of the land as now judicially determined and interpreted in the State of Illinois to complainant's mortgage contract executed prior to such change of judicial interpretation of the law of the land in the State of Illinois contrary to the Constitution of the United States of America and particularly to section 10 article 1 of said Constitution, and in not adjudging and decreeing that the law of the land as established by judicial decisions and interpretation in the State of Illinois at the date of said contract enters into and becomes part thereof and cannot afterwards be so changed as to materially impair the rights and remedies thereunder, and in not determining, holding and decreeing that the law of the land in the State of Illinois has been so changed since the date of complainant's mortgage contract as to deprive her of material rights and
135 remedies thereunder, contrary to the Constitution of the United States of America.

11. The said supreme court of the State of Illinois erred in rendering its said final judgment in this; that in and by said final judgment, applying to complainant's said mortgage contract the law of the land as now established by judicial decision in the State of Illinois, and refusing to apply and enforce the remedies existing under the laws of the land in the State of Illinois as the date of complainant's said mortgage contract, the obligation of her said mortgage contract is materially impaired contrary to the constitution and laws of the United States of America.

12. The said supreme court of the State of Illinois erred in not sustaining and in overruling the first assignment of error made by appellant upon the record in said court, to wit: the court erred in sustaining said demurrer and dismissing complainant's bill.

13. The said supreme court of the State of Illinois erred in not sustaining and in overruling appellant's second assignment of error made upon the record in said court, to wit: the court erred in not overruling said demurrer and requiring defendant to answer.

14. The said supreme court of the State of Illinois erred in not sustaining and in overruling the first additional assignment of error made by appellant upon the record in said court, to wit: the circuit court erred in not holding that the certain statute of Illinois ap-

proved March 22nd, 1872, in force July 1st, 1872, entitled "An act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree": and section 30 thereof, set out in said bill of complaint, did not apply to the case, right, title and equity of appellant, set forth in her said bill of complaint.

15. The said supreme court of the State of Illinois erred in not sustaining and in overruling the second additional assign-
136 ment of error made by appellant upon the record in said court, to wit: the construction and interpretation and application by said circuit court of said statute of the State of Illinois, approved March 22nd 1872, (and more fully entitled and described in the additional assignment and specification of errors, number one (1) foregoing,) was and is unconstitutional and in violation of section 10 of article 1 of the Constitution of the United States of America.

16. The said supreme court of the State of Illinois erred in not sustaining and in overruling the third additional assignment of error made by appellant upon the record in said court, to-wit: the construction and interpretation and application by said circuit court of said statute of the State of Illinois, approved March 22nd, (and more fully entitled and described in the additional assignment and specification of errors, number one (1) foregoing) was and is unconstitutional and in violation of section 10 of article 1 of the Constitution of the United States of America.

17. The said supreme court of the State of Illinois erred in not sustaining and in overruling the fifth additional assignment of error made by appellant upon the record in said court, to-wit: said statute of the State of Illinois, approved March 22nd, 1872, (and more fully entitled and described in additional assignment and specification of errors number one (1) foregoing) and section 30 of said statute, as construed and applied by the circuit court in this case, is unconstitutional, and in violation of section 10 of article 1 of the Constitution of the United States of America.

Wherefore and for other manifest errors, in violation of the Constitution and laws of the United States, the complainant in error prays that said judgment of the supreme court of Illinois and the decree of said circuit court may be reversed and set aside and held for naught and said cause remanded for further proceedings in conformity to said Constitution and laws of the United States of
137 America.

Respectfully submitted.

JOHN S. MILLER,
MERRITT STARR,
W. W. HAMMOND,
Solicitors for Plaintiff in Error.

Endorsed on cover: File No. 18,957. Illinois supreme court. Term No. 306. Lydia Bradley, plaintiff in error, *vs.* H. W. Lightcap. Filed June 1, 1903.

FILE COPY. 2705

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 306.

LYDIA BRADLEY,
Plaintiff in Error,
vs.
H. W. LIGHTCAP,
Defendant in Error.

} Error to Supreme Court of Illinois.

Equity Case

BARNARD & WILLIS PRINT, CHICAGO.

27059

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 306.

LYDIA BRADLEY,
Plaintiff in Error,
vs.
H. W. LIGHTCAP,
Defendant in Error.

Error to Supreme Court of Illinois.

PLEADINGS.

Plaintiff in error filed her bill in chancery in the Circuit Court of Fulton County May 26, 1902, to establish her title to 680 acres of land in Mason County, Illinois, and to remove a cloud therefrom, and for injunction and general relief. Defendant in error demurred generally and specially. October 17, 1902, said Circuit Court sustained the demurrer, and plaintiff, abiding by her bill, the court dismissed the bill for want of equity. Plaintiff in error appealed to the Supreme Court of Illinois, where the decree of the lower court was affirmed April 3, 1903. This record is brought here upon writ of error under Section 709 of the Revised Statutes. This suit involves the same land and presents in considerable part the same facts and federal questions as case No. 243, on the present docket, which is a writ of error to review a judgment of the Supreme Court of Illinois affirming a judgment at law in ejectment in favor of defendant in error, Light-

cap, against Mrs. Bradley, plaintiff in error, and as case No. 343, also on the present docket, which is an appeal from the decree of the Circuit Court for the Northern District of Illinois, dismissing for want of jurisdiction a bill in equity brought by the present plaintiff in error against the defendant in error in that court. This present bill seeks to establish appellant's title to land in her possession, and to remove a cloud which, by force of a statute of Illinois, passed after her rights were acquired, and by the construction and application thereof by the courts of Illinois, will, if the judgment of the Supreme Court of Illinois be not reversed, impair her contract rights and deprive her of property without due process of law and deny her the equal protection of the laws.

27060

ALLEGATIONS OF THE BILL.

The bill herein (Print. Trans., 4 to 17) alleges that plaintiff in error was the owner, June 30, 1867, of a mortgage given by one Breedlove upon 1,200 acres of land in Mason County to secure a debt of $19,616; that Benjamin S. Prettyman bought the land subject to the mortgage; that Prettyman conveyed 680 acres of the land to Absalom McCune, August 13, 1868, and took from him the same day a trust deed on said 680 acres to E. G. Johnson, trustee for plaintiff in error, to secure three notes payable to her, each for $5,000, due one, two and three years after date. Said trust deed contained full covenants of warranty and condition of defeasance upon default in payment of any part of the debt, interest or taxes; that Prettyman then persuaded plaintiff in error to accept said McCune notes in place of the Breedlove notes and give him a release of the Breedlove mortgage upon the 1,200 acres; that McCune never paid either taxes, interest or either of the notes, and in 1871 plaintiff in error sent her agent to look up the 680 acres of land and found the 680 acres of land was swamp, and valued at from $1 to $10 per acre; that the taxes were unpaid since 1868, and McCune had left the state, after having reconveyed his equity of redemption to said Prettyman; that she thereupon took peaceable possession, and afterwards, at the March term, 1872, she filed a bill in the Circuit Court of Mason County, Illinois, in March, 1872, against said Prettyman, McCune and all others interested in said land, to set aside said release of said Breedlove mortgage for fraudulent representations, and

to foreclose, not only upon the 680 acres of swamp, but upon the 520 acres of valuable land, and for general relief; that said bill was contested by Prettyman, and resulted in a decree of foreclosure and sale of the McCune trust deed upon the 680 acres only; that at the foreclosure sale she bid in the property for $10,000, leaving about $20,000 of her debt unsatisfied; that the time allowed to the mortgagor or his grantees for redemption from said sale expired October 27, 1880, and that of judgment creditors on January 27, 1881, and no redemption or effort to redeem was made, and she was then and thence continued in uninterrupted, actual, exclusive, adverse possession, by her tenants, hostile to all the world besides, and has thence hitherto continued and still continues in such possession; that in the meantime she had continued in possession, had rented and inclosed the lands and made such use of it as the nature of the land would permit, and paid all the taxes as they became due; that after the expiration of the period of redemption of the mortgagor, and prior to the commencement (in July, 1895) of the ejectment suits hereinafter mentioned, she, relying on her complete and absolute right and title in and to said 680 acres of land, improved the land by complete drainage, erection of suitable farm buildings and fences, and reduced the land to cultivation, thereby increasing its value to $65 per acre; that she so spent for drainage about $5,000, for buildings about $5,000, and current taxes over $5,000; and she has, by her tenants, remained in actual, open, visible and exclusive possession of said 680 acres of land continuously since November, 1871, to the present time, and still remains in such possession; and that she has all said time been and is in such possession as owner, claiming to be

the owner in fee thereof; that on June 11, 1894, the heirs at law of Johnson, trustee in said mortgage deed (then deceased), by deed of conveyance conveyed said lands to complainant; that afterwards, on the 30th of November, 1894, there was placed on record in the recorder's office of Mason County aforesaid, a quitclaim deed of said 680 acres from said Prettyman to defendant in error, Lightcap, bearing date September 4, 1893, which was taken with full notice of the rights and possession of plaintiff in error, and without actual, valuable or real consideration, and that said Lightcap is contriving how he may deprive plaintiff in error of her said property under color of a certain statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, and is subjecting and causing her to be subjected to the deprivation of her rights, privileges and immunities in and to said lands, and her property and vested rights therein, secured by the constitution and laws of the United States and by the constitution and laws of Illinois, by a certain action of ejectment and proceedings thereon and means hereinafter set forth; and that said deed from said Prettyman to said Lightcap is a cloud upon her title, and is being used by him in order to accomplish such deprivation; that on the 13th day of July, 1895, defendant in error sued in ejectment in the Circuit Court of Mason County the tenants of plaintiff in error in possession of said land, claiming to be the owner in fee; that said cases were consolidated and plaintiff in error admitted to defend, and a change of venue taken to Fulton County, where the trial was had, resulting in judgment for plaintiff in error. But this judgment was reversed and the cause remanded by the Supreme Court of Illinois at its October term, 1898, and after two rehearings the opinion of the Supreme Court was filed, October 19, 1900,

as the same is reported in Volume 186, Illinois Reports, at pages 510 to 536, which is made a part of this bill by reference, and the main portions thereof are set out in the bill.

That the question in controversy in said litigation was the construction and effect of said statute of 1872, Sec. 30, Ch. 77, Rev. Stat. Ill. (set out in full below); that the statute thus construed as divesting her of right and title to said premises by reason of her failure to take out a deed on the certificate of purchase was enacted after the date of her trust deed, at which date the statute of 1845 was in force in Illinois, and by that statute there was no time limited within which a holder of a certificate of purchase must take out a deed.

That said Supreme Court of Illinois, in construing and applying said statute, have given it an *ex post facto* effect, contrary to the Federal Constitution, and have given force and effect to the language of said statute, which annuls the title vested in plaintiff in error, so that she is unable longer to defend said actions at law.

That by the law of the land, as established by the decisions of courts of last resort, at the date of her mortgage contract, and which became a part of her contract, she was the real owner and became vested with absolute title upon breach of condition, while the mortgagor had only an equity of redemption; and upon the expiration of the period of redemption the mortgagor's title was extinguished, and thereafter he could not question the title and right of possession of plaintiff in error; that said statute of 1872, as so construed by the Supreme Court of Illinois, if enforced against her, does and would impair the obligation of her contract and deprive her of her rights and remedies, contrary to Section 10 of

Article 1, and to Section 14 of Article 2 of the Federal Constitution; and that the same purports to annul said certificate of purchase, and, as construed and applied by the Supreme Court of Illinois in this case, is not a mere limitation law, but is a law professing and attempting to deprive your oratrix of and terminate the vested right and title which she had on January 28, 1881 (when the period of redemption had fully expired), and thence thereafterwards, and that as so construed and applied by said Supreme Court, this would deprive her of her property without due process of law, contrary to the 14th Amendment of the Federal Constitution.

That upon the next trial of said ejectment cases, after and under said remanding order, plaintiff in error failed to prove that she had secured a deed from the master in chancery, as provided by said statute, and the court, applying said statute of 1872, as so construed by said Supreme Court, instructed the jury to find, and the jury accordingly did find, her guilty, and that defendant in error was the owner in fee of the land, and thereupon judgment was entered against her in accordance therewith.

That thereupon she took a new trial under the practice of said state, and said cause stands for trial *de novo* at the next May term of said Circuit Court; that she is unable to present any other or further defense or proof of her title than as herein alleged, and under the said ruling of said Supreme Court of Illinois, construing and applying said act of 1872, to deprive her of her vested property and contract right, the result of such trial must necessarily be adverse to her, and result in a judgment, unless relief herein be granted, and defendant Lightcap be enjoined from the further prosecution of said suit; and she is about to lose her said property beyond recov-

ery, unless the prosecution of said ejectment cases is enjoined.

The prayer is that defendant, Lightcap, be required to convey, and for injunction against defendant in error forbidding him from asserting ownership, from entering or taking possession or dispossessing complainant, and alternatively that he be enjoined from further prosecuting said ejectment suit; and that said deed of Prettyman to defendant in error be given up and surrendered for cancellation and be declared a cloud on the title of plaintiff in error, and plaintiff in error's title established and confirmed. (Print. Trans., 5-17.)

The purport of the ruling of the state court denying her relief was: That the title and right of possession herein asserted by plaintiff in error, acquired under the said mortgage deed, breach of condition thereof, possession by her, the foreclosure decree and sale and the failure of the mortgagee or his grantee to redeem, were divested or defeated by virtue of a statute of Illinois, enacted after her mortgage was given, and after she had taken the possession upon breach of condition, for the reason that she had, as the court holds, failed to take out a master's deed within the time limited by said statute; and that the mortgagor or his grantee, whose right and title, but for said statute, had become extinct, had, by virtue of said statute, become vested with the title in fee simple, absolute, without any redemption or payment.

The provision of the statute of 1872 in question is that relating to deeds of masters in chancery on foreclosure sales, and reads as follows:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled

to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act, the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed." Approved March 22, 1872. In force July 1, 1872. (Rev. Stat. Ill., Chap. 77, Sec. 30.)

The provision of law as to the issue of master's deeds upon foreclosure sales, which was in force when the mortgage in question was made, and thence until the enactment of said statute of 1872, was as follows:

> "If such lands or tenements so sold shall not be redeemed, as aforesaid, either by the defendant or such creditor, as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer who sold the same, or his successor in office, or his executors or administrators, to complete such sale, by executing a deed to the purchaser." (Rev. Stat., 1845, Chap. 57, Sec. 22, p. 304; Gross' Statutes, 1869, p. 381.)

The statute as to redemptions then in force was that mentioned in *Bronson* v. *Kinzie*, 1 How., 311, and is set out at pages 6, 7-8 and 15 in our brief, in case No. 243, on the present docket, and between the same parties. It provided in substance that it should be lawful for the mortgagor of any lands sold under decree for the sale of

mortgaged lands, or his grantees, to redeem the same within twelve months from such sale by paying to the purchaser or to the officer who sold the same the amount bid, together with interest at 10 per centum, from the time of the sale, and it provided that "and on such sum being made, as aforesaid, said sale and the certificate thereupon granted shall be null and void." (Rev. Stat. 1845, Ch. 57, Sec. 13; Gross' Stat. 1869, p. —.)

There was, prior to the said statute of 1872, no law prescribing any limitation of time within which a master's deed should be taken out. In *Rucker* v. *Dooley*, 49 Ill., 377, which was decided after the mortgage in question was made, the Supreme Court of Illinois, created a limitation of twenty years, *ex debito justitiae, for taking out a sheriff's deed on execution sale upon a judgment, which it held applicable as against a purchaser who was never in possession, and in favor of a bona fide purchaser in possession.* But that ruling would not apply to limit or affect the right of a mortgagee purchasing at a master's sale under foreclosure and in actual and rightful possession.

Questions Involved.

These are shown by the following contentions of plaintiff in error:

1. We maintain that the statute of 1872, as construed and applied by the courts of Illinois, as aforesaid, impairs the obligation of the mortgage contract in question, and the contract rights of plaintiff in error, contrary to Section 10 of Article 1 of the Constitution.

2. That by the said statute and by the action of the courts of Illinois in construing and applying the same, as aforesaid, plaintiff in error is deprived of her property

by the State of Illinois, without compensation and without due process of law, in violation of the 14th Amendment to the Constitution.

3. That the State of Illinois, by said unconstitutional statute, and by its courts in construing and applying the same, and by the judgment of its court about to be entered for that purpose, at the suit of defendant in error and on his application, and by the writ of ejectment for that purpose about to be awarded and issued at the said suit and request of defendant in error to dispossess her of her land, now in her peaceable and rightful possession, is about to deprive her of her property without due process of law, contrary to said 14th Amendment. And she seeks in this suit to establish and to protect therefrom her title and right and prevent such deprivation.

4. That the State of Illinois, by the judgment of its courts in ejectment and by the People's writ of ejectment to be issued therein, at the suit of defendant in error, under color of some change in the law of Illinois, made either by statute or by change in the rule of decision, or both, after the rights of plaintiff in error became vested, is about to deprive her of her property without due process of law, contrary to said 14th Amendment.

5. Under the law in force when the contract was made, and which was a part of the contract, the sale and certificate of purchase thereupon issued would become null and void only upon redemption within the time prescribed; but by this statute of 1872 they are made void at the end of five years after the expiration of the period of redemption, without any redemption or payment whatever, if the mortgagee purchaser (although in possession) fails to get a master's deed; and so her contract rights are impaired.

6. Under the law, which was a part of this contract, the mortgagee in possession after condition broken was the real and actual owner in fee, having the *jus in re* as well as the *jus ad rem*. The mortgagor only had an equitable right to redeem. By the decree and sale under decree the time within which this right to redeem might be exercised was limited to twelve months from the sale. Upon the expiration of said twelve months after the sale, the mortgagor's right to redeem was forever barred; but by this later statute the mortgagee purchaser's estate is divested and the mortgagor given the entire estate in fee without redemption or payment.

7. If said statute of 1872 be held unconstitutional or inapplicable to affect her rights under her mortgage, or if it were given a construction within constitutional limits, as a statute of limitations,—for instance, that unless the master's deed be taken within the time limited no deed shall be thereafter issued,—plaintiff in error can maintain her bill, and was entitled to the relief prayed. She had a vested equitable title from and after January 27, 1881, as *cestui que trust*, under the mortgage trust deed, as purchaser and certificate holder in possession, absolutely entitled to a deed of the legal title. And she had the legal title by conveyance from the heirs at law of the trustee in the mortgage deed. She is therefore entitled to have the cloud created by Prettyman's deed to defendant in error removed, and defendant in error enjoined from further asserting the said title against her at law.

ERRORS RELIED UPON.

First. The said Supreme Court of Illinois, in and by its said final judgment and decision, erred in holding and adjudging a certain statute of the State of Illinois, to wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872, in force July 1, 1872, being Section 30, Ch. 77, of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to Section 10, Article 1 of said Constitution, and in not holding said statute of the State of Illinois, as construed and applied by the Supreme Court of Illinois in and by its said final judgment, unconstitutional and void under said section of the Constitution of the United States of America.

Second. Said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that said statute of the State of Illinois (more particularly described in the last foregoing assignment), as construed and applied to complainant's said mortgage contract, made and entered into prior to the enactment of said statute, by the said final judgment and decision of said Supreme Court of the State of Illinois, impairs the obligation of said contract, contrary to the provisions of the Constitution of the United States of America.

Third. The said Supreme Court of Illinois, in render-

ing its said final judgment and decision, erred in holding and adjudging a certain statute of the State of Illinois, to wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872, in force July 1, 1872, being Section 30, Chapter 77 of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to Section 1, Article 14, being the Fourteenth Amendment of said Constitution, and in not holding said statute of the State of Illinois, as construed and applied by the said Supreme Court of Illinois, in and by its said final judgment, unconstitutional and void under said section of the Constitution of the United States of America.

Fourth. The said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that said statute of the State of Illinois (more particularly described in the last foregoing assignment), as construed and applied by the said Supreme Court of the State of Illinois, in and by its said final judgment, deprives complainant of her property without due process of law, contrary to the provisions of the Constitution of the United States of America.

Fifth. That said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that the said Lydia Bradley is thereby deprived of her property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America.

Eleventh. The said Supreme Court of the State of

Illinois erred in rendering its said final judgment, in this, that in and by said final judgment, applying to complainant's said mortgage contract the law of the land as now established by judicial decision in the State of Illinois, and refusing to apply and enforce the remedies existing under the laws of the land in the State of Illinois at the date of complainant's said mortgage contract, the obligation of her said mortgage contract is materially impaired, contrary to the Constitution and laws of the United States of America.

Twelfth. The said Supreme Court of the State of Illinois erred in not sustaining and in overruling the first assignment of error made by appellant upon the record in said court, to wit: The court erred in sustaining said demurrer and dismissing complainant's bill.

Thirteenth. The said Supreme Court of the State of Illinois erred in not sustaining and in overruling appellant's second assignment of error made upon the record in said court, to wit: The court erred in not overruling said demurrer and requiring defendant to answer.

BRIEF.

I.

The law of the land, at the time the contract in question was made, as recognized and enforced by the courts, providing means of enforcement of contracts, became a part of the contract the same as though included in its terms; and the statute of 1872, changing such law, after plaintiff in error's contract was made and title vested thereunder, as such law has been here construed and applied by the State Court, is a law impairing the obligations of her contract, and is obnoxious to Section 10, Articel 1 of the Constitution of the United States.

Tennessee v. *Sneed*, 96 U. S., 69.
Edwards v. *Kearzey*, 96 U. S., 595.
Louisiana v. *New Orleans*, 102 U. S., 203.
Walker v. *Whitehead*, 16 Wall., 314.
Field v. *Brokaw*, 148 Ill., 654.
Barnitz v. *Beverly*, 163 U. S., 118.
Seibert v. *Lewis*, 122 U. S., 284.
Bronson v. *Kinzie*, 1 How., 311 (319).
Gunn v. *Barry*, 15 Wall., 610.
Shapleigh v. *San Angelo*, 167 U. S., 646 (657).
Ogden v. *Saunders*, 12 Wheat., 213 (257).
McCracken v. *Hayward*, 2 How., 608, at 613.

For the purpose of passing upon its constitutionality, as applied to the rights of plaintiff in error here, said

statute must be understood to mean what the court of last resort of the state has construed it to mean.

Bell v. *Morrison*, 1 Pet., 351.
D'Wolf v. *Rabaud*, 1 Pet., 476.
Van Rensellear v. *Kearney*, 11 How., 297.
Tioga R. Co. v. *Blossburg & C. R. Co.*, 20 Wall., 137.
Townsend v. *Todd*, 91 U. S., 452.
Scipio v. *Wright*, 101 U. S., 665.
Wilson v. *North Carolina*, 169 U. S., 586.

II.

The English common law of mortgages was adopted in Illinois. A mortgage is a conditional conveyance of the fee. After condition broken, the title becomes absolute in the mortgagee, who may recover possession as against the mortgagor.

After condition broken the mortgagor has only an equity of redemption. After decree of foreclosure and sale, the right of redemption was limited to twelve months from the sale, and if not exercised within that time, it was barred. *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327 (331). The estates in the land remain the same in such case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale. *Id.*; *Wedgbury* v. *Cassell*, 164 Ill., 622 (626).

Such was the law of the state as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case.

Williams v. *Brunton*, 3 Gilm., 600 (622).
Kruse v. *Scripps*, 11 Ill., 98 (104).
Carroll v. *Ballance*, 26 Ill., 9 (16).
Chickering v. *Failes*, 26 Ill., 507 (519).

Nelson v. *Pinegar*, 30 Ill., 473 (481).
Griffin v. *M. Co.*, 52 Ill., 130 (145).
Kenyon v. *Shreck*, 52 Ill., 382 (386).
Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).

The right of the mortgagor or his grantees to redeem, after condition broken, is a purely equitable right, the creation of courts of chancery, and can only be asserted in a court of equity.

Kenyon v. *Shreck*, 52 Ill. 382 (386).
Bracken v. *Cooper*, 80 Ill., 221 (231).
Mulvey v. *Gibbons*, 87 Ill., 367 (383).

And so the law of Illinois remained after said date, and still remains and is enforced in cases where said statute of 1872 does not apply to change that rule.

Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Vallette v. *Bennett*, 69 Ill., 632 (635).
Harper v. *Ely*, 70 Ill., 581 (585).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).
Davis v. *Conn. Mut. Co.*, 84 Ill., 508 (510).
Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).
Smith v. *Mace*, 137 Ill., 68 (74).
Esker v. *Heffernan*, 159 Ill., 38 (40).
Walker v. *Warner*, 179 Ill., 16 (23).
Ware v. *Schintz*, 190 Ill., 189 (193).
Farrar v. *Payne*, 73 Ill., 83 (88).
Stone v. *Tyler*, 173 Ill., 147 (155).

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III.

The *cestui que trust* in a trust deed after condition broken is in equity the absolute owner of the title, just as at law the trustee is. Consequently, plaintiff in error as *cestui que trust* in the trust deed to Johnson, after breach of condition, was in equity the absolute owner of the title and right of possession, as she would have been at law had she been the mortgagee. And her possession after condition broken was the rightful possession of a mortgagee.

A. & E. Ency. of Law, 1st Ed., Vol. 27, p. 234, and cases cited.
Fountain v. *Bookstaver*, 141 Ill., 461 (466-7).
Kilgour v. *Gockley*, 83 Ill., 109.
Croxall v. *Shererd*, 5 Wall., 268.
Lewin on Trusts and Trustees, p. 674.
Nicoll v. *Walworth*, 4 Denio., 386.
Badgett v. *Keating*, 31 Ark., 400.

IV.

By said law of Illinois, as it existed at the date of the mortgage contract, the equity of redemption and all right whatever in or to said premises of said McCune and his grantee, Prettyman, was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of the sale to plaintiff in error by the express provisions of the decree of foreclosure, and the defendants, McCune and Prettyman and all persons claiming under them since the commencement of the foreclosure suit February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in

and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within twelve months after October 27, 1879.

The final order and decree of the Supreme Court of Illinois in this case, establishing a different rule of law, to wit: that the title of the mortgagor is not completely divested by the foreclosure and sale and expiration of the period of redemption, but survives, and that the title of the mortgaged premises did not become absolute in the trustee for use of plaintiff in error, but that all her right, title and interest ceased January 27, 1886, unless she sooner secured a deed from the master in chancery, and that she is not longer entitled to hold possession as against the mortgagor and his assigns, deprives or will deprive plaintiff in error of the right, title and interest vested in her under the laws of the state as they existed at the date of her mortgage, and when condition was broken, and when she took possession, and when this suit was brought, without due process of law, and violates the prohibition of the 14th Amendment of the Federal Constitution.

Chicago, Burlington & Quincy Railroad Co. v. *City of Chicago*, 166 U. S., 226.

Scott v. *McNeal*, 154 U. S., 34 (45).

Taylor v. *Beckham*, 178 U. S., 548 (599, 605).

Tindal v. *Wesley*, 167 U. S., 204 (222).

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V.

If plaintiff in error, in possession of the land in question, has an equitable title, a court of equity will establish and protect the same and enjoin proceedings at law and direct the cause to proceed in equity, and will remove the cloud or direct a conveyance.

Ruckman v. *Cory*, 129 U. S., 387.
Mills v. *Lockwood*, 42 Ill., 111 (118).
Wilson v. *Byers*, 77 Ill., 76 (84).
Smith v. *Spencer*, 73 Ala., 299.
McKibbin v. *Bristol*, 50 Mich., 319.
Pollock v. *Gilbert*, 16 Ga., 398.
Pierson v. *Ryerson*, 5 N. J. Eq., 196.
Carpentier v. *Montgomery*, 13 Wall., 480.
Barnett v. *Cline*, 60 Ill., 205.
Reed v. *Reber*, 62 Ill., 240.

ARGUMENT.

I.

THE STATUTE OF 1872, AS CONSTRUED BY THE SUPREME COURT OF ILLINOIS, IMPAIRS THE CONTRACT RIGHTS OF PLAINTIFF AN IS UNCONSTITUTIONAL.

1. Because, as so construed, it purports not only to make the certificate of purchase null and void in the hands of plaintiff in error, although she was in the rightful possession of the land, under a complete equitable estate, but also purports to annul the sale itself and her equitable estate thereby acquired, while she contracted for a sale, certificate of purchase and equitable estate, which were not subject to annulment.

2. The statute substitutes the right to a contingent and defeasible estate in such purchaser in possession, after the period of redemption has expired, for the absolute estate for which she contracted.

3. It gives to the mortgagor out of possession, five years after his right of redemption has become barred, the absolute estate in fee simple, without any redemption or payment, while under the law of the contract the purchaser in possession has that estate, and the mortgagor at that time would have no shadow of right whatever as against the purchaser in possession. The statutes condemned in *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608; *Gantly's Lessee* v. *Ewing*, 3 How., 707; *Howard* v. *Bugbee*, 24 How., 461; *Edwards* v. *Kearzey*, 96 U. S., 595, and *Barnitz* v. *Bever-*

ly, 163 U. S., 118, did not attempt any such drastic impairment of the contract as that.

In determining whether a contract has been impaired, this court ascertains for itself what the contract was, and so what the law of the state was which formed a part of the contract. In determining whether the contract has been impaired by a later statute, the construction of such later statute by the state court is taken.

Barnitz v. *Beverly*, 163 U. S., 118 (122).

The law of Illinois existing when the mortgage contract was made became a part of the contract and created and defined the legal and equitable obligations thereof. This embraced alike those laws which affect its validity, construction, discharge and enforcement. *Bronson* v. *Kinzie*, 1 How., 311 (315); *Walker* v. *Whitehead*, 16 Wall., 314; *Barnitz* v. *Beverly*, 163 U. S., 118.

Under that law the mortgage here conveyed the legal title, and upon condition broken (which had occurred here before this act of 1872 was passed) the mortgagee's title became at law absolute. (See authorities, *supra*, p. 17-18.) The mortgagor or his grantee had then merely the right in equity to redeem by payment of the mortgage debt, which could be asserted only in a court of equity. (*Kenyon* v. *Shreck*, 52 Ill., 382 (386); *Bracken* v. *Cooper*, 80 Ill., 221 (231); *Mulvey* v. *Gibbons*, 87 Ill., 367 (383). The mortgagee in possession had the right to retain the possession until payment and could not be deprived thereof without payment or discharge. *Harper* v. *Ely*, 70 Ill., 581 (585); *Dickason* v. *Dawson*, 85 Ill., 53 (55). By that law, so long as the mortgagee purchaser remained in the possession, her right was not affected by any laches or limitations. *Mills* v. *Lockwood* (1866), 42 Ill., 111 (119); *Parker* v. *Shannon* (1891), 137 Ill., 376 (392-3;

Ruckman v. *Cory*, 129 U. S., 387. The operation of any statute of limitations was suspended by such possession. *Fountain* v. *Bookstaver*, 141 Ill., 461 (468). Under the law of this mortgage contract there was no way in which the mortgagor or his grantee out of possession could ever recover or regain the mortgaged land except by redemption by payment.

The mortgagee, under her mortgage contract, had the right to several remedies; they were cumulative and two or all of them might be carried on concurrently or successively. She might sue at law on the mortgage debt; enter for condition broken or bring ejectment therefor, and prosecute a bill in equity to foreclose the mortgage. *Vansant* v. *Allmon*, 23 Ill., 30; *Rogers* v. *Meyers*, 68 Ill., 92.

Plaintiff in error here pursued two of her remedies concurrently, viz.: (1) She entered upon condition broken and maintained her possession; and (2) she obtained a decree in equity of foreclosure and sale, and herself purchased at the sale for about one-third of the amount due. This remedy of foreclosure in equity was not given by any statute in Illinois, but was the exercise of the inherent jurisdiction of the court of equity. But by statute there was allowed an extension of the period for redemption after the sale (twelve months to the mortgagor or his grantee). By that statute, the purchaser was entitled to receive from the officer making the sale a certificate in writing describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the mortgagee, the amount of his bid and the time when the purchaser would be entitled to a deed, unless the same should be redeemed as provided in the statute. The statute also required the officer to file a duplicate of the certificate in the office of the recorder of deeds, and declared

that said certificate should be taken and deemed evidence of the facts therein contained. (Rev. Stat. Ill., 1845, Chap. 57, Secs. 12, 24; Gross Stat., 1869, pp. 380, 382.)

It will be observed that under that law the certificate of purchase was only *evidence* of the purchase; and not the purchase itself or essential to its validity. The effective thing was, not the certificate of purchase, but the decree and sale and purchase thereunder, and confirmation of the sale, the expiration of the period of redemption and (superadded in this case) the actual possession.

Under the law which was a part of the mortgage contract here in question, the certificate of purchase so provided for and held by a mortgagee-purchaser in possession could not be in any way annulled, much less could a valid sale itself be invalidated or annulled,—and such purchaser's equitable title, when the time for redemption had expired, was complete and absolute.

When the mortgagor or his grantee had let the period, so allowed for redemption, pass without redeeming, all his right in or to the premises was forever barred and gone. *Smith* v. *Mace*, 137 Ill., 68 (73, 74); *Bozarth* v. *Largent*, 128 Ill., 95 (107, 108); *Burgett* v. *Osborne*, 172 Ill., 227 (238). He then had no interest whatever in the property. (*Burgett* v. *Osborne, supra.*) For that reason it was held that he could not object to any irregularities in the sale by a judgment creditor redeeming from such sale during the following three months allowed him therefor. (*Bozarth* v. *Largent, supra.*) The sale upon the judgment of such redeeming creditor "is of nothing that belongs to him"—the mortgagor. (*Smith* v. *Mace, supra.*)

By the law of the mortgage contract the legal title outstanding in the trustee in the mortgage deed, after the sale, was held in aid of and in trust for the purchaser at the

sale, in case there was no redemption from such sale within the time limited therefor. *Williams* v. *Brunton,* 3 Gilm. (Ill.), 600 (622); *Kruse* v. *Scripps,* 11 Ill., 98 (104); *Farrar* v. *Payne,* 73 Ill., 88. The mortgagor has not any interest therein after his right to redeem has expired. Moreover, in the foreclosure suit here the trustee in the trust deed, Johnson, who held the legal title, was not made a party to the suit. (Print. Tr., 17-26.) The legal title in him, therefore, was not affected by the decree or sale. *Lambert* v. *Hyers,* 22 Ill. App., 616. That legal title was conveyed by his heirs to Mrs. Bradley. (Print. Tr., 8.)

In *Brobst* v. *Brock,* 10 Wallace, 519 (530), this court, speaking of the rule of law in such cases governing the rights and titles of mortgagor and mortgagee, in jurisdiction where the common law prevails, as in Illinois, held that courts of equity, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and that bills to redeem are entertained upon the principle that even when the debt secured by the mortgage has been paid or tendered, the mortgagee still holds the legal title, but holds it for the mortgagor. The court say:

> "It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost. The estate or interest, though defeasible at its inception, became unconditional on the failure of the mortgagor

to pay the money secured, or fulfil the condition at the time appointed for performance.

"Courts of equity have in modern times relieved against such forfeitures, and, in favor of a mortgagor, have extended the time for redemption. But such courts, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered."

In *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327 (331), it was held that the position of the mortgagor, after the foreclosure sale and during the time allowed for redemption "was substantially of a mortgagor, with a right to redeem," while the purchaser at the sale "acquires no new title to the premises until the period of redemption has passed and he is entitled to his deed." The court further said:

"His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time."

That was the law of this mortgage contract.

But this statute of 1872, as it is construed by the Supreme Court of Illinois, takes away the legal title vested in the trustee Johnson and vests it in the mortgagor; and it substitutes a contingent or defeasible equitable estate in such purchaser in possession, after the time allowed for redemption has expired, instead of such absolute one for which this mortgagee contracted; and it not only removes the bar of the mortgagor's equity

of redemption, for which plaintiff in error contracted, in case the mortgagor should fail to redeem,—it does not stop with restoring a right in the mortgagor to redeem, but it enlarges such equity of redemption into an absolute estate in fee simple absolute without any redemption or payment whatever. The statute, which in *Bronson* v. *Kinzie* was held to impair a mortgage contract, did much less; it only provided that the equitable right of redemption of the mortgagor should not be immediately extinguished, but should remain for twelve months after the sale. If this statute of 1872 had merely given the mortgagor a further right to redeem by making payment to the purchaser, Mrs. Bradley, after the expiration of five years, in case she had not yet taken out the master's deed, then *Bronson* v. *Kinzie, McCracken* v. *Hayward, Edwards* v. *Kearzey and Barnitz* v. *Beverly* would be express authorities that it would be an impairment of her mortgage contract . How much clearer and more drastic is the impairment by a statute which gives the mortgagor the entire estate free of the mortgage or purchase, and entitles him, without requiring of him any redemption or payment, to eject the purchaser from the possession of the premises after nearly twenty years, during which she has, on the faith of her estate and rightful possession, expended very large sums in making the land valuable and in the buildings and other improvements thereon.

That this result is due to this statute of 1872 in question is shown by the language and reasoning of the majority opinion of the State Court in this case. It says, referring to this statute:

> "The language of this statute is clear and unambiguous. Plainer terms could not have been employed for the purpose of setting bounds to the

rights acquired by a certificate of purchase and limiting them to five years after the period of redemption. The statute was so construed in *Peterson* v. *Emmerson*, 135 Ill., 55. The court, in the absence of express legislation on the subject, had formulated in *Rucker* v. *Dooley*, 49 Ill., 377, an equitable rule, based upon the analogies of the law, and it was urged upon the court that equity might order a conveyance based on a foreclosure sale after the certificate was barred. The court, then speaking by Mr. Justice Baker, said (p. 60): 'But this rule was abrogated by the legislative enactment of 1872, not only in respect to the period of limitation, but also by the provision that if a deed was not taken out within the time limited the certificate should be null and void. It is sticking in the bark to say that, notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree, by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute, and an infringement of vested legal rights.' In that case the purchaser asking relief was in possession. The statute was enacted because the legislature were not satisfied with the limitation fixed by the court in *Rucker* v. *Dooley*, either in respect to the period of eight years and three months or the power of a court to give effect to the certificate after that time, within twenty years. If they had been satisfied with the rule of the court in either respect they would not have changed it in both. The statute fixed the limitation at five years, and abrogated the rule that the purchaser should have any right after that time, by declaring that the certificate should be null and void. The court had not annexed any qualification to its rule respecting possession and no exception on that ground was incorporated in the statute. Some statutes of limitation fix limits for the commencement of actions for the possession of real estate, and one who is in possession is not subject to such limitation, because he could not

bring an action and already has what would be gained by a suit for possession. An argument that such a statute does not apply to one in possession is without force in the construction of a statute like this one. The effect of possession as notice, or as relating to the doctrine of laches in courts of equity, has no relation whatever to the question. * * *

"The statute under which she purchased provided exactly what her purchase should be, what she should obtain by it, within what time she would be entitled to receive the title, and after what time the certificate of purchase would become null and void, and all her rights under the purchase would cease. The statute gave her a right to receive the amount of her bid, with interest in case of redemption, and in case there was no redemption, to receive a deed within five years after the expiration of the period of redemption, and declared that if she did not take out the deed within that time the certificate would be null and void. * * * The statute does not transfer any right or title granted by the certificate of purchase or divest complainant, but it fixes, in definite terms, what she purchased." (Print. Trans., 63-64.)

And again (*id.*, p. 67) the opinion says:

"After the expiration of the period allowed for redemption, the complainant in this case became entitled to a deed, and that right continued for five years, during which time she might have obtained a deed, but when that time expired and her certificate of purchase became null and void, the only ground for holding that she had an equitable title ceased to exist."

The statute of 1872, without doing any violence whatever to its language, might have been held not to be retroactive, and so inapplicable to affect vested rights or rights under mortgages previously made, or the rights of persons in possession of land who had no need of any master's deed. It might have been held applicable only to prevent

the issue of a master's deed, leaving all existing rights unaffected. It might have been interpreted, according to its terms, that it affected only the certificate of purchase (which was only evidence thereof), but not the purchase itself or the decree or the rights of the purchaser in possession. If the statute of 1872 had been so construed as to avoid the constitutional objection, it must have been held to have no application to the plaintiff in error, who was in rightful possession, claiming title under a contract made prior to its passage; or if applicable at all, then that it only applied at most to cut off the particular remedy there limited, viz.: to receive a master's deed.

If this remedy is barred, then the holder of the certificate of purchase could not demand and receive a deed from the master in chancery. But that limitation law would not affect the estate or rights of the purchaser already in rightful possession. (*Mills* v. *Lockwood*, 42 Ill., 111 (119); *Parker* v. *Shannon*, 137 Ill., 376 (392-3); *Fountain* v. *Bookstaver*, 141 Ill., 461 (468). In all other respects, except the mere obtaining of the master's deed, the rights of the holder would remain as they were before. The rights of complainant in error, which were complete without the master's deed, would not be affected by the statute. The equitable title acquired under the trust deed out of which this certificate arose would remain. Having reduced the premises to possession peaceably under said trust deed prior to the enactment of said statute, and rightfully as owner of the equitable title under the law of the land at the time, that right of possession would remain.

This was well expressed in the dissenting opinion of Mr. Justice HAND in this case (Trans., 76-77):

> "The statute requiring a deed to be taken out within five years from the expiration of the period

> of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (*Ryhiner* v. *Frank*, 105 Ill., 326.) The same rules of construction must therefore be applied to this statute that the courts have heretofore applied to statutes of limitation in general, and the law is well settled in this state that statutes of limitation do not run against a party while in possession of land. (*Mills* v. *Lockwood*, 42 Ill., 111; *Wilson* v. *Byers*, 77 *id.*, 76; *Parker* v. *Shannon*, 137 *id.*, 376.) In *Parker* v. *Shannon*, *supra*, the court said: 'A statute of limitation or rule of limitation in equity does not run against a possessor of real estate, but it runs against him who is out of possession. (*Mills* v. *Lockwood*, 42 Ill., 111.) * * * To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law, and make it obnoxious to both the state and federal authorities.'"

It appears from the opinion of the majority here that they appreciated the force of this constitutional objection, expressed in the minority opinion, and in their effort to avoid it they emphasized it by invoking a rule which, as applied to the facts of this case, sustains our contention and the position so taken by Mr. Justice Hand, and not the conclusion in the majority opinion. Let us see:

It will be borne in mind that defendant in error, or his grantor, Prettyman, has never been in possession of the land in question since the five years time limited by the act of 1872 for taking out a master's deed expired, or at any time since plaintiff in error took possession in 1871; but the plaintiff in error, during that time, has been and is in actual and continuous adverse possession. (Trans., 7-8.) This litigation turns upon the question whether, by force of the statute of 1872, considered as a statute of

limitation, defendant in error can eject plaintiff in error from this possession. The majority opinion, in order to sustain the application of the act of 1872 as a sword in the hands of defendant in error to drive plaintiff in error from her possession, says (Trans., 64):

> "When the bar of the statute has become absolute it is just as available for attack as for defense; and in case of disseizin by the paramount owner, the title acquired by the bar may be asserted against him. One having no other title to land except under a statute of limitations may maintain his action against the one who has lost title by the same statute. (*McDuffee* v. *Sinnott*, 119 Ill., 449; *Faloon* v. *Simshauser*, 130 *id.*, 649; *Illinois Central Railroad Co.* v. *Moore*, 160 *id.*, 9.)"

The rule applicable here is that *the statute of limitations cannot be used for purposes of attack, unless the person claiming under it has been in actual possession of the land under it after the time prescribed by the statute, has become complete.* In *McDuffee* v. *Sinnott*, which is cited by the court, the rule is stated as follows:

> "Whenever the bar of the statute has become absolute, *and the party entitled is in possession under it*, it is thereafter just as available for attacking as for defensive purposes, and its availability in this respect will not depend at all upon the occupant continuing in the actual possession of the property." (119 Ill., 452.)

The rule is stated in the same language in *Illinois Central Railroad Co.* v. *Moore*, 160 Ill., 9, 16, which is also cited in the majority opinion. In *Paullin* v. *Hale*, 40 Ill., 274, 277, decided in 1866, and cited in *McDuffee* v. *Sinnott*, *supra*, the court say of the effect of a limitation law:

> "Ever since the case of *Newland* v. *Marsh*, 19 Ill., 376, *it has been the settled law of this court that this second section cannot be used as a sword, unaccom-*

> *panied by possession,* and to that rule we intend to adhere. * * * Until the owner of the color of title has united actual possession to the color and to the payment of taxes, he is in no position to invoke the aid of the second section, because *that section cannot become constitutionally operative until the person invoking its aid has acquired actual possession.* Then, for the first time, it properly becomes a limitation law. But when these three things have concurred, then all the incidents of any other limitation law follow, one of which is admitted to be the right to recover a possession temporarily abandoned by the person who has acquired the benefit of the bar. These principles have become rules of property throughout this state, and from them we do not intend to depart."

And to same purport are *Steele* v. *Gellatly*, 41 Ill., 39, 43; *McCagg* v. *Heacock*, 42 Ill., 153; *Hale* v. *Gladfelder*, 52 Ill., 91, and a uniform course of decisions.

The above rule, that a limitation law cannot be used for purposes of attack by one who has never been in possession of land thereunder, was based upon constitutional grounds, following the decision in *Newland* v. *Marsh*, 19 Ill., 376, that the ground upon which limitation laws, when applied to existing rights, are held to be consistent with the constitutional principles here invoked, is that they apply to the remedy only and leave the right untouched. And so the rule was settled and should have been held applicable here (if this statute were to be given a constitutional effect), which is laid down by the court in *Mills* v. *Lockwood*, 42 Ill., 119; *Parker* v. *Shannon*, 137 Ill., 392-3, and other cases above cited by us, that a statute of limitations does not run against or affect a person in possession of real estate, who needs to resort to no remedy, but only against one out of possession.

But it may be said the language of the statute here in

question does not necessarily imply the annulling of any right appertaining to property. It has, however, been so construed and applied by the Supreme Court of Illinois. It could have been construed as a statute of limitations, depriving the holder of the certificate of any further remedies under the certificate after the time limited.

It should have been so construed, by modification of the language of the statute if necessary, so as to give it effect within constitutional limits. Such a thing was done in *Newland* v. *Marsh,* 19 Ill., 376, when the limitation statute expressly declared that the holder of color of title to land, after complying with certain provisions of the statute, "should be deemed the legal owner."

But it may be contended the courts of Illinois are not extending the effect of the *statute* to the mortgage contract, but are merely enforcing the law of mortgages as it exists independently of said statute, when they hold, as stated in the opinion in this case:

> "After condition broken she might have pursued all the different remedies allowed her by law, until satisfaction was obtained by one or the other, but when a decree of foreclosure was entered and the land sold, the security had been appropriated towards the satisfaction of the debt, and all her rights in the land merged in the decree and sale (citing several cases). After the sale the trustee had no title and nothing remained of the indebtedness except the personal liability of McCune. The title that the trustee had was only for the purpose of enforcing the provisions of the trust deed, and that having been done by the court, his powers, rights and duties were at an end. The sale created a new relation, in no manner affected by the fact that complainant had been the party secured by the trust deed, but dependent upon the statute, which permitted any person to become the purchaser, and admitted all bidders on terms of absolute equality." (Trans., pp. 64-65.)

> "The title must remain in the original owner until it passes out of him by the execution of the deed; and this is a title for all beneficial purposes." (*Id.*, 66.)
>
> "Defendant's title is a perfectly valid, legal title, and not a mere cloud to be cancelled and removed." (*Id.*, 68.)

This cannot be done. It is too plain that but for this statute of 1872 plaintiff in error would have been herein held to have an absolute equitable estate in this land. She has that such estate, unless this statute has divested her of it. But for that statute defendant in error, or his grantor, would be held not to have any right, title or interest in this property. If he now has any, it is because this statute has vested it in him.

If the above quotation from the opinion is a statement of the law of mortgages as it now exists in the State of Illinois, and as determined by the courts of last resort in that state, then the law of the land providing the remedies upon mortgage contracts as it existed at the date of the McCune mortgage, and which became a part of said mortgage contract, has been so changed by subsequent decisions of the courts of last resort that it has deprived plaintiff in error of her equitable title which vested in her upon breach of condition of said trust deed under the law as it then stood, which the state courts are prohibited from doing by the Fourteenth Amendment, as we shall endeavor to show under title III.

We desire first to call attention to a few points in the opinion above quoted by which it will appear that these changes are by virtue of this statute and in order to give it effect:

> "After condition broken she might pursue all the different remedies allowed by the law until satisfaction was obtained by one or the other."

These remedies were to reduce the mortgaged premises to possession, peaceably if possible, by ejectment if necessary, and to retain possession until satisfaction of the debt; to sue in assumpsit the mortgage debtor, and to prosecute a bill in equity to foreclose the mortgage. It is admitted plaintiff in error was pursuing two of these remedies concurrently, foreclosing in equity and reducing the premises to possession. But the court continue:

> "When a decree of foreclosure was entered and the land was sold, the security *had been appropriated* towards the satisfaction of the debt, and all her right in the land *merged* in the *decree* and *sale*."

But under the law of this contract her right in the land was not less by reason of the decree and sale than before the decree and sale. If the security had been appropriated, then it belonged to plaintiff in error. If the certificate of purchase conveyed no estate, this must have been accomplished by the confirmation in plaintiff in error of the equitable title she already had, and by the sale of all this to her, subject still to the right of redemption, but with that right now limited to a fixed period. If "all her rights in the land merged in the decree and sale" to herself, clearly she got by the sale more and not less than she had before; and the mortgagor had less.

The trust deed was *evidence* of equitable title and right of possession in plaintiff in error after condition broken. The decree so finds and confirms the title. The *trust deed* is then merged in the decree, and the *decree* becomes evidence of the title. The equitable title is not lost, but protected by the decree. Plaintiff in error could still have recovered in ejectment. (*Esker* v. *Heffernan*, 159 Ill., 38.)

This claim of merger of *title* in a *decree* was made in *Williams* v. *Brunton*, 3 Gilm., 600 (618-22), and the law stated as above.

But the court continue: "After the sale the trustee had no title." (Trans., p. 65.) In *Lightcap* v. *Bradley,* 186 Ill., 510 (525) the same court say that "the title which had been in the trustee was sold by the court," and so, sold to plaintiff in error. It was not sold to the mortgagor. In the next paragraph of the opinion here (p. 66) they say: "The certificate of purchase conveyed no title to complainant." But by the valid sale and the failure to redeem, a complete equitable title passed to the purchaser. The certificate was only evidence of the sale, and not the sale itself. As the title in the trustee was sold to the plaintiff in error, if it did not pass to her, that title remained in aid of her right. Clearly a proceeding to *foreclose* Prettyman's equity of redemption could not *reinvest him* with the legal title.

The idea that because the "title the trustee had was only for the purpose of enforcing the provisions of the trust deed," "that having been done *by the court,* his powers, rights and duties were at an end," and therefore the legal title in him was revested in the mortgagor, is absurd, and never could have been held except as the effect of and because necessary in order to give full effect to this statute of 1872.

The court plainly showed that the effect given to this statute was one to divest titles. "If the title of Prettyman passed out of him at the expiration of the period of redemption, it must have gone somewhere. It was not *in nubilus,* and it did not go to the complainant or any other person." (Print. Trans., 65-66.) The answer to this, under the law which formed a part of this mortgage contract, was clear. The legal title remained in the trustee in the trust deed in trust for the mortgagor if he had redeemed (*Brobst* v. *Brock,* 10 Wall., 530, quoted,

supra; Wedgbury v. *Cassell,* 164 Ill., 626, quoted below), and in aid of the rights acquired by the purchaser at the sale and in trust for her when the period for redemption had expired. (*Williams* v. *Brunton,* 3 Gilm., 622; *Kruse* v. *Scripps,* 11 Ill., 104; *Farrar* v. *Payne,* 73 Ill., 88.) The equitable estate, upon the expiration of the time for redemption, was complete and absolute in the purchaser. The court felt compelled, in order to give effect to this statute, to hold as a result of the statute, that the title or estate was in the mortgagor.

The court further say in the said opinion: "The sale created a new relation in no manner affected by the fact the complainant had been the party secured by the trust deed, but dependent upon the statute, etc." But the relation was necessarily affected by that fact. The mortgagee, who was in possession and entitled to remain in possession until paid, and who was the beneficiary of the decree and sale, necessarily held a different relation from that of a stranger purchasing. For instance, the mortgagee purchasing was required to pay no money (other than for expenses), and the section of the statute prescribing the form of the certificate of purchase recognized this, by providing that if the purchase of the land was by a third person, the certificate should state "the sum paid therefor," while if by the complainant, mortgagee, it should state "the amount of his bid." (2 Starr & Curtis' Stat., p. 2352, Sec. 16.)

What is this new relation? Does buying at her own sale reduce the mortgagee in possession—who has the right to remain in possession until redemption, and has the legal title, absolute at law, and subject only to the right in equity to redeem—to the position of a mere certificate holder out of possession? In-

stead of buying in the land, did she *surrender* her title and right to possession for the certificate of purchase? No; the new relation referred to must be in addition to the former one, the rights of the *holder* of the *equity* of *redemption* being *reduced* to a definite period of redemption, after which all his right would cease.

The Supreme Court of Illinois fully answer this question, as to the nature of this "new relation," in *Wedgbury* v. *Cassell,* 164 Ill., 622 (626), as follows, Mr. Justice CARTWRIGHT delivering the opinion:

> "A new relation and new property were created, but there was a continuation of the same debt with a new creditor, and in the form of a new lien of a like degree and more valuable than the mortgage. In the case of a mortgage, it is necessary to go into court and obtain a decree of foreclosure, while in case of a certificate there is no such requirement, and it is not subject to delay or contest. *The estates of the land remain the same in such case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale.* (*Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327.)"

It is a false conception to regard the decree as *functus officio* after sale. The true idea is as expressed in *Cochran* v. *Fogler,* 116 Ill., 194 (199): "The court of chancery is not *functus officio* until the decree is executed by delivery of possession." The true rule is that stated by Mr. Jones in his work on mortgages, Sec. 1660:

> "When the mortgagee purchases the title, according to the doctrine of the common law, the legal title is already in him, and the sale confirms him in the possession of the property; and without a deed from the trustee appointed to make the sale, he can maintain ejectment for the property."

As "the mortgagor still has the estate of a mortgagor" after the sale and during the time allowed for redemp-

tion, "with this qualification, that the amount and time for redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time" (*Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 331), the legal estate in the mortgagee must also remain outstanding after the sale, and if the mortgagee is the purchaser must, upon the termination of the period for redemption and upon failure to redeem, unite with his then complete equitable estate. In *Wedgbury* v. *Cassell, supra,* it was distinctly held that upon decree and sale "the estates in the land remain the same," with the qualification above stated that the amount and time for redemption are fixed.

II.

THE PLAINTIFF IN ERROR WILL BE DEPRIVED OF HER PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT, IF THE JUDGMENT OF THE STATE COURT IS NOT REVERSED.

Under the law of her contract, as we have shown, the plaintiff in error became seized and possessed of a complete equitable estate upon the expiration of the period of redemption in 1881. Under color of said statute of 1872, which can, under the constitution, have no valid application to affect her rights, she is about to be deprived of said property without compensation.

All the considerations urged as before apply here, and it is clear that she is entitled to invoke the protection of the 14th Amendment against said statute, as it has been construed and applied by the state court herein.

III.

THE DECISION OF THE SUPREME COURT OF ILLINOIS IN THIS CASE IS ITSELF OBNOXIOUS TO THE FEDERAL CONSTITUTION, BECAUSE IT MAKES SUCH A CHANGE IN THE LAW OF THE LAND AS TO DEPRIVE PLAINTIFF IN ERROR OF HER EQUITABLE TITLE TO THE LAND IN QUESTION WITHOUT DUE PROCESS OF LAW, AND TO DENY TO HER THE EQUAL PROTECTION OF THE LAW.

Besides giving to the statute of 1872 a construction and effect which makes it obnoxious to the constitution, the state court has, in its decision here, under color of a rule of decision, deprived plaintiff in error of her property and denied to her the equal protection of the law.

What was the law of the land in the State of Illinois as to the title of the mortgagee after condition broken at the date of the McCune mortgage?

Carroll v. *Ballance*, 26 Ill., 9, is considered a ruling case upon this question. Mr. Justice BREESE in that case said (p. 15):

> "The questions presented by this record are: Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgage premises in ejectment against the mortgagor, or those claiming under him, when one or more notes are due and unpaid, and without notice to quit to the party in possession, before action brought?"

The English cases are then reviewed at some length, and the conclusion reached is expressed in the following language (p. 20):

> "We think it is settled that a mortgagee may maintain ejectment on condition broken, without notice to quit, and that the condition is broken when

one or more installments are due and unpaid, because the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition."

In *Chickering* v. *Failes*, 26 Ill., 507 (519), the court said:

"By the mortgage deed the legal title passes to the mortgagee, but in equity the right of redemption remains in the mortgagor, even after the condition broken. But at law, after condition broken, the mortgagee may bring his ejectment and recover possession. The mortgage is a deed of conveyance, with a condition annexed, and purports on its face to convey the title, but the condition authorizes the mortgagor to defeat the title thus conveyed and to reinvest it in himself, by a performance of the condition. After a failure to perform the condition, the title apparently becomes absolute in the mortgagee, and is clearly color of title."

In *Mulvey* v. *Gibbons*, 87 Ill., 367 (382), it is held:

"At the date of the decree (a decree *nisi* in strict foreclosure), and for a considerable time afterward, the property was worth very much less than the amount due of the mortgage debt. The decree determined the rights of the parties, that unless the amount due was paid within thirty days, the defendants should be debarred from all equity of redemption of the premises. There is no pretense of the payment of any part of the money, or of excuse for non-payment, or of any readiness or disposition to pay anything. Why, in reason and justice, should not the right of redemption be barred, as the decree declared?

"The absence of a further order of confirmation was here a lack of but the merest technical form. According to the rule as laid down by Daniell, if the defendants did not pay the money the plaintiff's rights to the property became absolute, though in order to complete his title there must have been a final order confirming it.

"If the plaintiff's right to the property had become absolute, how, before a court of equity, could that consist with any remaining right of redemption in these defendants? Why, in that court, where the real right, regardless of form, is regarded and given effect to, should not such an absolute right, as thus declared, be recognized and asserted?

In *Kenyon* v. *Shreck*, 52 Ill., 383, this court recognize and declare the principle that the right of a mortgagor or his grantee to redeem after condition broken is a purely equitable right, which can be asserted only in a court of equity, and when its assertion would be plainly inequitable, that court will withhold its aid; and that where a defective foreclosure has been had, such equity of redemption will not be permitted to be asserted against an equity still stronger. And see *Hamilton* v. *Lubukee*, 51 Ill., 420; *Munn* v. *Burges*, 70 *id.*, 604; *Bush* v. *Sherman*, 80 *id.*, 160."

Many other quotations to the same effect could be made from authorities cited in our brief.

By the law of the land at the date of the breach of condition in the McCune mortgage, the legal title became vested in the trustee Johnson for use of plaintiff in error. She therefore had a vested equitable title to the land. She was entitled to possession, which she secured without objection. She might have proceeded to acquire the legal title by advertisement and sale, or by foreclosure in equity. She chose the latter course in hope of securing other relief also. She prosecuted her foreclosure to decree and sale, became purchaser and secured a certificate of purchase. Here the effort to secure the legal title seems to have ended, no one knows why.

It is now claimed by defendant in error and decided by the Supreme Court of Illinois that the proceedings to foreclose superseded the authority of the trustee to sell and convey the legal title, and this may be true.

If so, then plaintiff in error can never secure the legal title and must be content with the equitable title she held as *cestui que trust,* and which she has protected by maintaining her possession and by purchasing at the master's sale. This was done in aid of her equitable title, not in derogation of it.

Moreover, under the terms of the decree of foreclosure, it was provided that unless the defendant Prettyman redeemed within the time required by law, the master in chancery should convey said premises to the purchaser at such sale. After the expiration of the period of redemption, therefore, plaintiff in error was entitled, whenever she demanded it, to receive the legal title. She had therefore a perfect equitable title.

By what means is it claimed this equitable title has been divested?

If by the statute of 1872, then the statute is unconstitutional, as we have already seen. It is beyond question that if the statute of 1872 had not been passed, her equitable title would have remained unaffected; and all the mortgagor's right would have remained forever barred and extinguished. It seems, then, that this divestiture of title has then been accomplished by the statute, as construed and applied by the court.

But if this result is brought about by judicial decision, by a change of the views of the courts of last resort, since the date of said transactions, by which the rights secured to her by the law as settled and determined by courts of last resort, when her mortgage was made and her rights became vested, are taken away, then the plaintiff in error has been deprived of her property without due process of law and in violation of her constitutional rights, secured by the 14th Amendment.

A few quotations from the many decisions of this court upon this point will confirm this statement.

In *C., B. & Q. Ry.* v. *Chicago,* 166 U. S., 226, the property of the railroad company was taken for a street, in condemnation proceedings, which were regular according to the statute, but the verdict of the jury and the judgment of the court awarded only nominal damages, $1. This proceeding was alleged to be in contravention of the 14th Amendment, taking property without due compensation. The court said in part:

> "But a state may not by any of its agencies disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

And much more is there said, both in the opinion of the majority and in the dissenting opinion, confirming the correctness of the contention we are making in this case, viz.: that if the equitable title once vested in plaintiff in error by the acts of the parties under the law, as then understood and promulgated, it cannot be afterwards divested by a change of judicial holding.

In the case of *Bank of Kentucky* v. *Stone,* affirmed in this court without opinion, May 15, 1899, the charter of the bank exempted it from taxation for a certain time, and the Supreme Court of the State construed the charter as a contract which could not be repealed. Afterwards, however, the same court changed its views and upheld a tax levied against the bank. In the Circuit Court the published opinion seems to indicate that this was the material point in the case, and their opinion hold-

ing that such a change of judicial construction was a violation of constitutional restrictions was apparently affirmed by this court. (88 Fed. Rep., 383.)

In *Ex Parte Virginia,* 100 U. S., 339, the constitutional question arose upon indictment of a county judge for excluding negroes from the jury list, and it was held that his act was in violation of the 14th Amendment, since he represented the state, was clothed with power to act by the state, and through him the state deprived negroes of rights guaranteed by the Constitution. In this case the act was not judicial, but administrative.

In *Scott* v. *McNeal,* 154 U. S., 34, the Federal question was whether the 14th Amendment of the Constitution was violated by a decision of the state court in an action of ejectment sustaining the title of defendant in error, who derived title through an administrator's sale, where it subsequently developed that the person whose estate was administered was not in fact dead. The court said (p. 45):

> "The 14th article of amendment to the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." (Citing *Virginia* v. *Rives,* 100 U. S., 313, 318, 319; *Ex Parte Virginia,* 100 U. S., 339, 346; *Neal* v. *Delaware,* 103 U. S., 370, 397.

The principle we are illustrating is that plaintiff in error cannot be deprived of her title to this land which had become vested in her, either by the arbitrary act of legislature or decision of the courts of the state, without

due process of law. If the laws of the land vested the title in her at the time, the Supreme Court of Illinois can not now, by arbitrarily denying that the laws did have that effect, divest her title. Such arbitrary exercise of power has been checked wherever it has been attempted.

Yick Wo v. *Hopkins,* 118 U. S., 356.
Henderson v. *New York,* 92 U. S., 259.
Chy Lung v. *Freeman,* 92 U. S., 275.

In discussing this point, the Supreme Court of Illinois, in the opinion attached to the record, say (p. 65):

> "The second proposition is that the complainant has equitable title to the premises through the trust deed, the sale and expiration of the period of redemption, which gave her a right to a master's deed. It is argued that after fifteen months the right of redemption of Prettyman and his creditors was gone, and that right being barred he had no title, but that complainant is the equitable owner, although the certificate became null and void. If the title of Prettyman passed out of him at the expiration of the period of redemption it must have gone somewhere. It was not *in nubibus* and it did not go to complainant or any other person. The certificate of purchase conveyed no title to complainant."

It is not pretended the certificate of purchase carried any title. That passed nothing; it was *merely evidence* of certain facts therein stated, as provided by the statute requiring it. The effective part of the foreclosure was the decree and the sale and the running of the period of redemption; and their purpose and effect, where the mortgagee was the purchaser, were to *foreclose, i. e.,* cut off and bar the equitable right of redemption in the mortgagor and his grantee, Prettyman, the legal title having already passed to Johnson, trustee, and so being out McCune or Prettyman. By such *sale,* when con-

firmed by the court, the purchaser got an incipient interest that might or might not ripen into an absolute estate. (*Bruschke* v. *Wright*, 166 Ill., 191.) And this did so ripen into and become a complete equitable title upon expiration of the redemption period. When the mortgagee, who already held the equitable title, became the purchaser, the effect of all this was to foreclose and bar the equity of redemption. The theory that the certificate of sale was the only right the purchaser got is unsound. The trust deed had already conveyed the legal title to Johnson, upon a condition of defeasance in 1868. Under the law of mortgages, such as prevails in Illinois, courts of equity, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption; and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid. *Brobst* v. *Brock*, 10 Wall., 519 (530). The condition had been broken in 1871 and *then* the title of Prettyman passed to Johnson for use of plaintiff in error, and Prettyman had only the equitable right to redeem. It was not necessary that it should pass again at the expiration of the period of redemption. It was only his equity of redemption which expired then. That did not pass to anybody. It passed away; was foreclosed and barred. The title which *had* passed to the trustee and *cestui que trust* more than ten years before was not affected in any way, except to be freed of any right or risk of redemption.

It is quite a different case when sale is made under a judgment. There the previous mortgage conveyance is wanting and the title is conveyed only by the sheriff's deed. There has been no previous conveyance of the legal title, nor any confirmation of the sale by the court;

and until the time for redemption has expired, the purchaser at a sale or execution "is only regarded as a bidder." *Johnson* v. *Baker*, 38 Ill., 98 (102).

The case cited by the Supreme Court of Illinois in support of their views above quoted is a judgment sale, and yet, even there the Michigan court regard the purchaser and certificate holder as having the whole equitable title, while the judgment debtor had only a naked legal title, after expiration of redemption.

The observations and citations of the Supreme Court of Illinois next following (Trans., p. 66), to the effect that ordinarily the purchaser and certificate holder is not entitled to possession, rents and profits, are no doubt correct. But the mortgagee, who becomes the purchaser, and for a part only of the mortgage indebtedness, is entitled to such rents and profits, as was recognized in *Bogardus* v. *Moses*, 181 Ill., 554 (559, 560). In the case under consideration possession had been secured at a time when plaintiff in error was entitled to it. In the states where the mortgage is regarded, even at law, as a mere security for the indebtedness, and in equity under the English rule as to mortgages (which prevails in Illinois), it is held that the mortgagee has an equitable claim upon the rents and profits in so far as they may be needed to discharge so much of the mortgage debt as cannot be realized out of the corpus of the property. *Hart* v. *Respes*, 89 Ga., 87; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 94 Fed., 269. In the opinion at bar it is not denied that the mortgagee after condition broken may both foreclose in equity and sue in ejectment (p. 64). If he forecloses in equity *only*, the statute gives the right of redemption and he cannot get possession until that expires. But he can concurrently recover possession in

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ejectment, and so get into possession before or after decree of foreclosure. *Esker* v. *Hellerman, supra.*

Moreover, it appears from the very case cited by the Supreme Court of Illinois in the support of their claim that the certificate holder is not entitled to possession, the case of *Whiting* v. *Butler*, 29 Mich., 122, that "one who is entitled to a deed of premises has an equitable right in them." If so, in a case where the purchaser had no previous conveyance, but only a certificate of purchase under a judgment lien, certainly this authority supports our position, that plaintiff in error was, after condition broken, absolute owner of the equitable title as against the mortgagor and all persons holding under him; and after the expiration of the mortgagor's redemption, when plaintiff in error became entitled to a deed upon demand January 27, 1881, she was certainly the owner of the equitable title, and in possession. How, then, can any statute of limitation, or judicial decision of any court, divest that title without due process of law? And the ejectment cases are not such due process of law. *Williams* v. *Brunton, supra.* The case of *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327, also, which was decided in 1867, the year before our mortgage was made, sustains our position.

The dissenting opinion of Mr. Justice Hand, in the case at bar, expresses the law upon this point. He says (p. 74):

> "So soon, however, as the right of redemption had expired the appellant became equitable owner of the land with the right to take a deed, which would have vested her with the full title to the land, both equitable and legal, and the grantor of appellee had left remaining in him only the naked legal title to the land, which could have been divested by the appellant at any moment and without any act

being performed by the grantor of appellee. All that was then necessary to complete her full title and ownership was the execution to her of a deed by the master. The master had no legal or beneficial interest in the land. He was simply a conduit through which, by virtue of a deed, the legal title would pass from the grantor of appellee to the appellant. As the grantor of appellee at that time had only the legal title, all the equitable interest in the land was in appellant, and upon uniting the legal title and equitable interest in her by a master's deed, her title would have been consummated and become complete.

In *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327, the court had under consideration the question whether or not the mortgagor had an insurable interest in the mortgaged property after foreclosure and sale during the time allowed for redemption, and it was said (p. 331):

'At the time of the fire, then, the position of Stephens was substantially that of a mortgagor, with a right to redeem.

That in this position he would have had a substantial, insurable interest does not admit of doubt. His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this state the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien in order to cut off intervening encumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.'

The case of *Whiting* v. *Butler*, 29 Mich., 122, is very instructive upon the questions of the respective rights of the judgment debtor and purchaser in premises sold upon execution after the term of redemption has expired. Opinions were filed by four different members of the court. Mr. Justice Cooley, on page 129, says:

'After Drury had become entitled to a sheriff's deed, Campau's title would have been a mere legal title with the whole equitable right in Drury.' And Mr. Justice Campbell, on page 143, said: 'The Drury title became an indefeasible right as soon as the statutory period of fifteen months expired. The interest which Drury obtained by his execution sale was a vested and valuable interest. Though not the legal estate, it was an equitable estate.'

Jones, in his work on Mortgages (Vol. 2, Sec. 1661), in speaking of the rights of parties after sale, says: 'The mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.'

In *Ketchum* v. *Schicketanz*, 73 Ind., 137, it was held that with the expiration of the time allotted for redemption the holder of a sheriff's certificate for land sold on execution or decretal order acquires an equitable estate in the land, of which one-third will pass to the wife upon the bankruptcy of the husband under the statute of that state, which provides that the surviving wife shall have one-third interest in all the lands in which the husband had an equitable interest at the time of his death, and that her *inchoate* interest in his lands shall vest absolutely where the same are conveyed away from him, under judicial proceedings.

In *Wright* v. *Douglass*, 2 N. Y., 373, it was held the interest of a purchaser at an execution sale after the time of redemption had expired becomes an estate subject to sale upon attachment.

It seems clear that the equitable estate in said

lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal title thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought ejectment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession, during the period of redemption, was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked legal title. As was said in *Whiting* v. *Butler, supra* (p. 139):

'His right to a deed had become complete and vested. All he lacked of a legal title to the land, superior and paramount, was the legal evidence such a deed would afford, and his right to this evidence or muniment was not contingent—not dependent upon the will or discretion of any one. It was so complete that it was not necessary for him to resort to equity to obtain it if withheld. The right to it was so plainly and exclusively fixed and legal as to be cognizable at law and enforceable by mandamus' —and in this state the appellant could have obtained the relief by motion. *People* v. *Bowman*, 181 Ill., 421.

Under the repeated decisions of this court it is clear that by virtue of the terms of the statute above referred to, upon the failure of the appellant to take out a deed within the time fixed therein, the certificate of purchase issued to her became null and void, and that no right could be predicated thereon by her. (*Ryhiner* v. *Frank*, 105 Ill., 326; *Peterson* v. *Emmerson*, 135 *id.*, 55; *Belleville Savings Bank* v. *Reis*, 136 *id.*, 242; *Seeberger* v. *Weinberg*, 151 *id.*, 369;

Brown v. *Ridenhower,* 161 *id.,* 239.) The appellant, however, is not claiming any right here by virtue of the certificate of purchase, but being the equitable owner of the premises by virtue of the decree of foreclosure, the sale and the decree confirming the sale, and being in possession of the premises, the question is, should a court of equity permit her to be turned out of possession by one who has only the mere naked legal title to the land?

The statute requiring a deed to be taken out within five years from the expiration of the period of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (*Ryhiner* v. *Frank, supra.*) The same rules of construction must therefore be applied to this statute that the courts have heretofore applied to this statute of limitation in general, and the law is well settled in this state that the statutes of limitation do not run against a party while in possession of land. (*Mills* v. *Lockwood,* 42 Ill., 111; *Wilson* v. *Byers,* 77 *id.,* 76; *Parker* v. *Shannon,* 137 *id.,* 376.) In *Parker* v. *Shannon, supra,* the court said (p. 392): 'A statute of limitations or rule of limitation in equity does not run against a possessor of real estate, but it runs against him who is out of possession.' (*Mills* v. *Lockwood,* 42 Ill., 111.) 'The possession is notice to all of the possessor's equitable rights and he need to assert them only when he may find occasion to do so.' To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law and make it obnoxious to both the state and federal authorities.

It would seem, therefore, that while the right to a master's deed had been swept away by the statute, the statute had no effect upon the equitable interest of the appellant, accompanied, as it was, by her possession; that the statute did not operate upon the interest here asserted by reason of her possession, and that it is beside the case to say that the statute

> has barred her right to a deed. The equitable estate of appellant in the land after the period of redemption had expired arose, not out of the certificate of purchase, which amounted to no more than evidence of her bid and when the period of redemption would expire, but by reason of her bid, the application thereof upon the decree, and the fact that the appellee failed to redeem, and her possession."

Some of the respects, in which the rulings of the Supreme Court of Illinois in this case upon the law of mortgage as here applied (if the decision is not to be regarded as based altogether upon the act of 1872), deprive plaintiff in error of the protection of the law of her contract, appear from what we have before stated. We here summarize some of them:

(1) It was the law of this mortgage contract and a rule of property, as settled by the uniform decision of the Supreme Court prior to the decisions in this litigation, that a statute of limitations does not run against a possessor of real estate; and that such a statute is not available for attack, unless the person claiming the benefit thereof has been in possession thereunder after the bar has become absolute, and has then been disseised by the paramount owner. We have already cited a number of these authorities. Under them plaintiff in error was entitled to be protected in her possession.

In the case at bar the decision takes away and denies her this protection, and holds that such a statute may be used to oust plaintiff in error of her possession in ejectment, although the defendant in error has never been in possession of the premises.

(2) Under the law, which became a part of this mortgage, the legal title of the premises was in the grantee

therein, Johnson, as trustee. This legal title was not destroyed or affected by the sale under the foreclosure decree, and the mortgagor was not revested with the legal title upon or by the entry of the decree or the sale thereunder. *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327; *Wedgbury* v. *Cassell*, 164 Ill., 622 (626); *Williams* v. *Brunton*, 3 Gilm., 622; *Kruse* v. *Scripps*, 11 Ill., 104; *Farrar* v. *Payne*, 73 Ill., 88; *Brobst* v. *Brock*, 10 Wall., 530; Jones on Mortgages, Sec. 660. The effect of the decisions in this litigation, on the other hand, is that upon the sale the legal title in the mortgage was divested, and vested in the mortgagor McCune or his grantee Prettyman.

(3) Under the law of this mortgage contract, the equity or right of redemption in the mortgagor McCune or Prettyman was absolutely barred when the time for redemption was allowed to expire without any redemption. But according to the decision of the Supreme Court of Illinois in this case, not only did such right of redemption not expire, but it was changed into the legal estate in fee and became an estate in fee simple absolute, without any redemption or payment whatever, upon the failure of plaintiff in error in possession to take out a master's deed.

(4) By the law, which was a part of this contract, the equitable estate of the purchaser at foreclosure sale, upon the expiration of the time for redemption, was complete and absolute, and when carried out by actual, peaceable and adverse possession, was as efficient, without any master's deed, as with the master's deed. But according to the rule of decision in this case, such estate is destroyed, and it is held that plaintiff in error, without such master's deed, has no estate or right to maintain her possession; and the State of Illinois, by its judgment in ejectment

and the writ of the people of the state to be issued in such ejectment suit is, unless this court shall intervene and reverse the rulings of the state court, about to deprive the plaintiff in error of her property.

With great respect we suggest that the decisions of the Supreme Court of Illinois, relied upon by that court for its rule of decision herein (*Smith* v. *Smith*, 32 Ill., 198; *Seligman* v. *Laubheimer*, 58 Ill., 124; *Ogle* v. *Koerner*, 140 Ill., 170, and *Davis* v. *Dale*, 150 Ill., 239), have been misconceived by the court. We submit that they have no application to this case, or to any question arising upon its facts. The only point decided in *Smith* v. *Smith*, *supra*, was that in a decree of foreclosure the lower court erred in decreeing that, in the event of the sale under the decree, notes not due should be paid out of the proceeds; and in its opinion the court incidently remarked that if the party should sell or foreclose for the amount due according to the terms of the mortgage, "this of necessity would be a release of the security for the amount not due." Plainly that case has no bearing upon the question of the rights of the parties here.

In *Seligman* v. *Laubheimer*, *supra*, the point of decision was that a second mortgage, seeking to redeem, under the statute, from a sale under a decree of foreclosure of an elder mortgage than his own, could do so by paying the amount bid at such sale with interest, and that the holder of the prior mortgage could not afterwards resell the land to pay a deficiency. In that case, after such redemption, the holder of the prior mortgage who had purchased at the sale under his decree for less than the indebtedness found due, applied to the court for a resale of the property to pay the deficiency, on the theory that his mortgage lien was still subsisting, even as against the

second mortgagee, who had redeemed from the prior sale. But as such right of redemption was governed by the statute, and the second mortgagee, having redeemed in strict accordance with the statute, it was held he was entitled to the benefits of his redemption; otherwise, the right of a grantee to redeem is the merest delusion—a trap for the unwary; and that his redemption was not equivalent to a redemption by the mortgagor and did not restore the parties to their position before the sale. It was for the purpose of the facts of that case that the language of the court in its opinion was used; and it can have no application to the questions here involved as to the rights of the parties after the period for redemption has expired without any redemption. Of the cases so cited, those are the only cases which were decided before the mortgage in question was made. But the case of *Ogle* v. *Koerner* and *Davis* v. *Dale* have no better application. The question and rulings in *Ogle* v. *Koerner* was substantially the same as in *Seligman* v. *Laubheimer*. In *Davis* v. *Dale* the ruling was that when the mortgaged premises were bid off by the mortgagee, at the foreclosure sale, for the full amount of the decree, interest and costs, the owner of the equity of redemption, and not such purchaser, is entitled to the possession and rents during the period allowed for redemption; and that in any event, if held by a receiver, the possession and receipt of rents by the receiver would be for the benefit of the person entitled to the same. In *Bogardus* v. *Moses*, 181 Ill., 554 (559, 560), the same rule was again held to be applicable in a case where the sale brought the full amount of the decree, but it was recognized (p. 560) that a different rule would be applicable if the sale was for a less amount and there were a deficiency, as was the fact in the case at bar.

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(1) It was the law of this mortgage contract and a rule of property, as settled by the uniform decision of the Supreme Court prior to the decisions in this litigation, that a statute of limitations does not run against a possessor of real estate; and that such a statute is not available for attack, unless the person claiming the benefit thereof has been in possession thereunder after the bar has become absolute, and has then been disseised by the paramount owner. We have already cited a number of these authorities. Under them plaintiff in error was entitled to be protected in her possession.

In the case at bar the decision takes away and denies her this protection, and holds that such a statute may be used to oust plaintiff in error of her possession in ejectment, although the defendant in error has never been in possession of the premises.

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(5) Since 1835 the following statute has been the law of Illinois:

> "Action brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire such title after taking such possession the limitation shall begin to run from the time of acquiring title." (Rev. Stat. Ill., Ch. 83, Sec. 4; 2 Starr & Curtis Stat., p. 2604.)

Upon the expiration of the period for redemption here, plaintiff in error had a connected title in equity deducible of record from the United States, and from a public officer (Master in Chancery) authorized by the laws of Illinois to sell such land under decree of a court of record. She was possessed of such land, by actual residence of her tenants thereon, for seven successive years and upwards prior to the commencement of the ejectment suits referred to in her bill of complaint herein. These facts constituted a perfect bar to the defendant in error's ejectment suits, under said statute of 1835, as the same was construed and applied by the uniform decisions thereunder, prior to the decisions of the Supreme Court of Illinois in this litigation. *Irving* v. *Brownell*, 11 Ill., 402; *Collins* v. *Smith*, 18 Ill., 160; *Martin* v. *Judd*, 81 Ill., 488; *Gregg* v. *Tesson*, 1 Black, 150; *Dredge* v. *Forsyth*, 2 Black, 563; *Dolton* v. *Cain*, 14 Wall., 472. But the bill of complaint herein shows that unless the judgment of the Supreme Court of Illinois be reversed and her bill of

complaint against defendant in error sustained, the State of Illinois, by the judgment in ejectment in the suits of defendant in error here in question, and by its writ therein, will deprive plaintiff in error of her said property without any compensation and without due process of law.

IV.

IF SAID STATUTE OF 1872 BE HELD CONSTITUTIONAL WHEN CONSTRUED AS APPLICABLE TO AFFECT THE RIGHTS OF PLAINTIFF IN ERROR OR AS VESTING DEFENDANT IN ERROR WITH TITLE, OR BE GIVEN A CONSTRUCTION CONSISTENT WITH THE FEDERAL CONSTITUTION, PLAINTIFF IN ERROR CAN MAINTAIN HER BILL; AND THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS AND THE DECREE OF THE CIRCUIT COURT OF FULTON COUNTY SHOULD BE REVERSED.

The Supreme Court of Illinois has affirmed the decree of the Circuit Court, dismissing the bill for want of equity. As they construe and apply this statute, all title of plaintiff in error ceased when she failed to take a master's deed; and the title of defendant in error was revested. She has neither legal nor equitable title; and he has both, because such is the effect of the act of 1872.

But if this court holds with us upon the constitutional questions, the deed to defendant in error received from Prettyman, and his claim of title thereunder, is a mere cloud upon the title of plaintiff in error, and her title is complete. It will not be affected either by the statute or the decision of said court, but will remain as determined by the law of Illinois at the date of the mortgage contract.

What that law was has already been considered. We

are content to adopt the statement by Justice Hand of the law upon this point and its effect upon the title of the parties so far as this case is concerned, to wit (Trans., p. 76):

> "It seems clear that the equitable estate in said lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal title thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought ejectment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession during the period of redemption was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked legal title."

If plaintiff in error has an equitable title, a court of equity will enjoin proceedings at law and direct the cause to proceed in equity.

Mills v. *Lockwood*, 42 Ill., 111, is an illustration of this principle, and the case is in many respects like the case at bar.

Cephas Mills had deeded the lands in question to one Biers, through whom Lockwood claimed, but an error had been made in the description. Possession had been given of the land and Lockwood held possession. Ejectment was brought by parties claiming under Cephas Mills subsequently to his deed to Biers. Lockwood endeavored to make title by tax deed, by limitation and by adminis-

trator's sale upon claim filed against the estate of Cephas Mills. All of these defenses proved defective and judgment was finally secured against him. Taking a new trial under the statutes of Illinois, by which the final judgment was vacated, he filed his bill in equity for injunction against said ejectment proceedings and for reformation of deed. The bill was sustained and the relief granted. Upon the question of laches in applying to a court of equity the court said:

> "On the point of laches, in not resorting to this remedy at an earlier period, the answer is, the statute of limitations has not run against the complainant, and he has been, all the time since his purchase, in the peaceable possession of the lands. He was in no position to act; he could only be quiet, awaiting the attack of those who supposed they had paramount title. In such case, the lapse of time is not material. So soon as the heirs at law of Cephas Mills brought their action of ejectment, and recovered a verdict, then complainant filed this bill alleging the mistake and seeking to correct it. He had no motive to move before he was molested. If there be any laches, is it not rather imputable to the heirs, who slumbered on their rights, if they had any, so many years? It is not understood that a statute of limitations, or rule of limitation in equity, runs against a possessor of real estate, but it runs against him who is out of possession. *Barbour* v. *Whitlock*, 4 Monroe, 197."

In *Wilson* v. *Byers*, 77 Ill., 76, the land had been entered by David Rawlings, but there was a mistake in the certificate by which the range read south instead of north. After having been in possession of the patentee and his assigns for many years the land was platted as an addition to the City of Olney. Then Wilson procured a patent from the government by a correct description and made claim to the property. Byers *et al.* filed a bill in equity for relief and removal of cloud and for a convey-

ance to them by Wilson. The relief was granted, the court saying, in part:

> "It is insisted, too, that there has been such laches as should bar the claim for relief.
>
> Laches cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. *Mills* v. *Lockwood*, 42 Ill., 112. The possession is notice to all, of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.
>
> The tract was purchased by Wilson, with 'Porterfield' scrip, which was worth $5 per acre, because applicable to unoffered lands; and it is insisted that it was erroneous to compel Wilson to convey to complainants the rights held by him under this scrip; that it was an appropriation of this scrip to complainants' use without consideration. But Wilson purchased the land with notice and in consequent fraud of the rights of the complainants or their grantor, and held the title which he acquired, but as their trustee.
>
> Whatever the sum he might have paid for the land, it would in no wise affect complainants' right to a conveyance of the legal title."

Still more like the case at bar was *Ruckman* v. *Cory*, 129 U. S., 387. Bowers executed to Corey his bond for a deed for lands in Mason County, Illinois, and Corey went into possession, and made extensive improvements. Bowers conveyed the land to Ruckman, a cousin of Corey's, at the latter's request. Ruckman deeded the land to a woman whom he afterwards married. Later the woman secured a divorce, and then brought ejectment against Corey, and recovered. Corey took a new trial as a matter of right under the Illinois statutes, and filed his bill in equity for injunction, relief and conveyance. It appeared that Corey had owed Ruckman at the

time the deed to him was made, but had subsequently paid the debt. The deed to the woman was voluntary.

The relief was granted, including an order on Mrs. Ruckman to convey the legal title to Corey.

We quote from the opinion:

"1. The contention that the plaintiff has a plain, adequate and complete remedy at law cannot be sustained. It is not certain that he can successfully defend the action of ejectment. Besides, only a court of equity can compel the surrender of the legal title held by the defendant and invest the plaintiff with it.

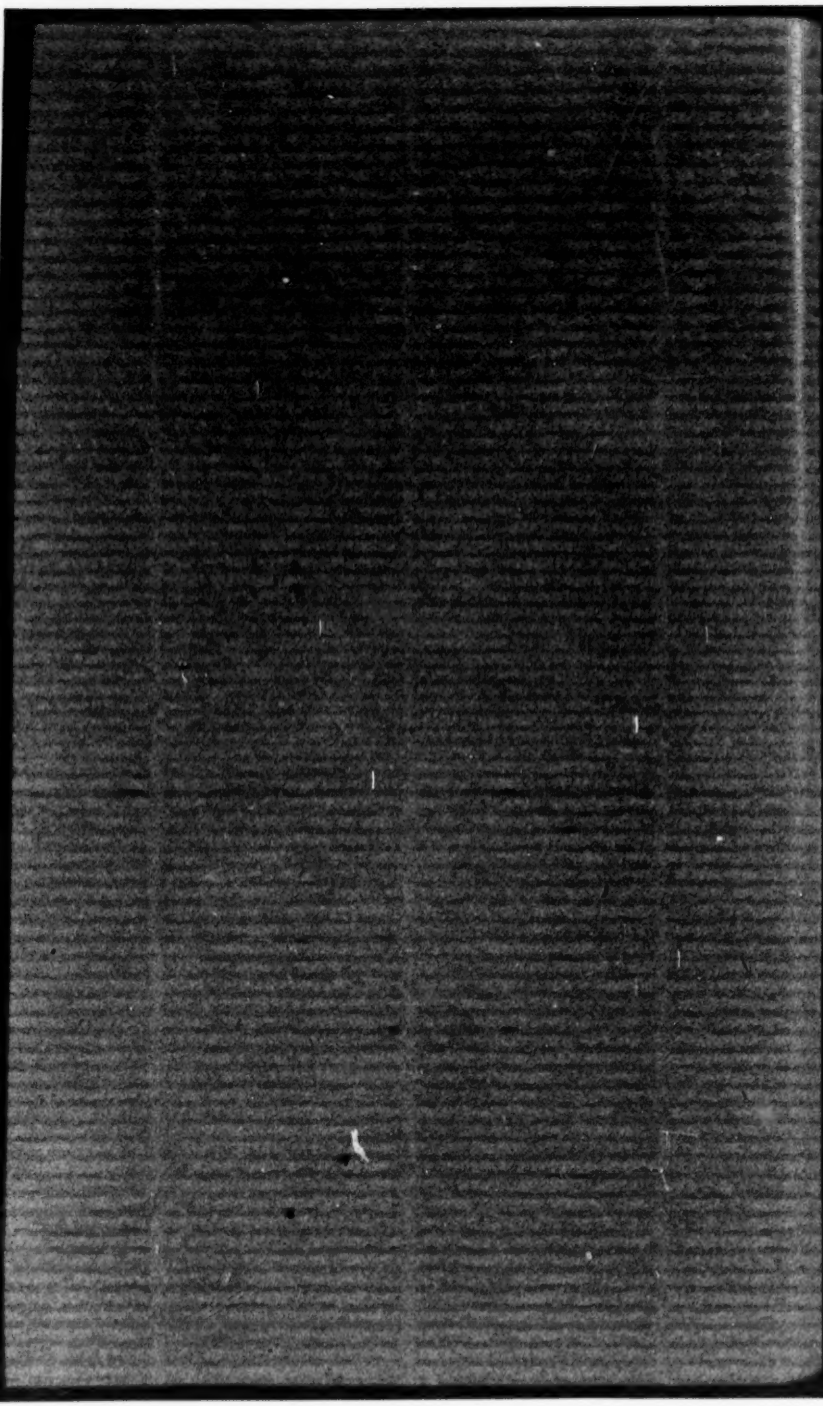
2. Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were absolute owner, the question of laches might be a more serious one for him than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted. *Mills* v. *Lockwood*, 42 Illinois, 111, 118. 'Laches,' the Supreme Court of Illinois has well said, 'cannot be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.' *Wilson* v. *Byers*, 77 Ill., 76, 84. See, also, *Barbour* v. *Whit-*

lock, 4 T. B. Mon., 180, 195; *May's Heirs* v. *Fenton,* 7 J. J. Marsh., 306, 309."

Many decisions to the same effect in the several state Supreme Courts and in this court are cited in our brief. But the case of *Ruckman* v. *Cory, supra,* seems to us to be a precedent for the relief prayed in our bill. Only in this court of equity can plaintiff in error be afforded complete relief. The defendant in error holds as a volunteer with full notice of plaintiff in error's rights, and, as the bill alleges, without actual consideration. He should not only be enjoined from prosecuting said ejectment cases, but compelled to convey to plaintiff in error in order to perfect her title.

We ask that the judgment of the Supreme Court of Illinois affirming the decree of the Circuit Court of Fulton county dismissing her bill, and the last mentioned decree, be reversed, and that the cause be remanded to the Circuit Court of Fulton County.

JOHN S. MILLER,
MERRITT STARR and
W. W. HAMMOND,
For Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 306.

LYDIA BRADLEY, PLAINTIFF IN ERROR,

v.

H. W. LIGHTCAP, DEFENDANT IN ERROR.

IN ERROR OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Brief and Argument for Defendant in Error.

STATEMENT.

The plaintiff in error on the 26th day of May, 1902, filed the bill in this cause in the Fulton County Circuit Court of the State of Illinois, against defendant in error, to enjoin further proceedings in an ejectment suit, then pending in said court, in which the defendant in error, Lightcap, was plaintiff, and plaintiff in error, Mrs. Bradley, was defendant. The ejectment suit was first tried at the March term, 1896, of said court, at

which trial the defendant was found not guilty, and judgment was rendered against the plaintiff for cost, from which an appeal was taken to the State Supreme Court. At the October term, 1898, the State Supreme Court handed down its opinion, reversing the judgment of the lower court, and remanding the cause for further proceeding in accordance with the views expressed in its opinion. The defendant, Mrs. Bradley, at the same term of the Supreme Court filed her petition therein for a rehearing, which the Supreme Court granted, and the cause was thereupon reargued before that court and at the October term, 1899, of said Supreme Court, that court affirmed its former opinion. Afterward, of its own motion, the Supreme Court granted a second rehearing this was done on the motion and petition of Mrs. Bradley's counsel in which they assumed to act as *amicus curiæ*, and filed an extended petition and argument, as they had no right to a second rehearing, the court granted it as of its own motions, and the cause was again argued before the Supreme Court at its February term, 1900. At the October term, 1900, the Supreme Court handed down a final opinion adhering to its order reversing the judgment of the lower court and remanding the cause for further proceeding in accordance with the views therein expressed.

The bill then sets out the subsequent proceedings in the lower court in the ejectment suit, the retrial thereof which resulted in a finding and a judgment against her, that she had paid the cost and taken a new trial under the statute, and that the suit was, at the time she filed her bill, then pending for such new trial. The bill then avers that the controversy involved in the litigation in the ejectment suit was as to the "effect of the statute of the State of Illinois, Section 38, Chapter 77, approved March 22, 1872, in force July 1, 1872," setting forth a copy of the statute referred to. The bill then sets forth a part of the opinion of the State Supreme Court in the ejectment suit which is objected to (Printed Record, pp. 10 to 12). The bill then sets forth her version of the law of Illinois relating to mortgages, and its application to

the questions involved in the ejectment suit, and claims that the statute referred to as construed by the State Supreme Court in the ejectment suit, if enforced against her, "would impair the obligation of the contracts of the said [illegible] to [illegible], contrary to Section 10 of Article I of the Federal Constitution, and that the statute as construed deprives her of vested right and title to the property, which she claims she had, contrary to Sections 1 and 2 of the Fourteenth Amendment to the Federal Constitution, and for these reasons the Blue Ice bill and seeks to enjoin the ejectment suit, and asserts as a cloud upon her alleged title, the title claimed by the plaintiff in ejectment suit.

[illegible].

I.

A court of equity has no jurisdiction to entertain a bill to test the constitutionality of a statute, especially where the validity and construction of the statute is involved in a suit at law between the same parties and involving the same subject matter of litigation. If the statute is unconstitutional, or if the construction placed upon it by the State Supreme Court in the ejectment suit renders it unconstitutional the remedy of the plaintiff was by writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in the ejectment suit in which the validity and construction of the statute was involved, as provided in Section 709 of Chapter 28, Title 28, of the Revised Statutes of the United States which affords an adequate and complete remedy at law to determine those questions. And if the statute is valid then it is as binding on a court of equity as on a court of law, and equity will follow the law in its construction.

II.

The statute complained of is a limitation statute and as held to be by the State Supreme Court and enforced

as such. It does not contravene Section 10 of Article 1 of the Federal Constitution, nor Sections 1 and 5 of the Fourteenth Amendment. This court has frequently passed upon similar statutes and upheld their validity. (For Illinois cases see):

Ryhiner *v.* Frank, 105 Ill., 326-330.
Peterson *v.* Emmerson, 135 Ill., 55-60.
Seeberger *v.* Weinberg, 151 Ill., 369-380.
Brown *v.* Ridenhower, 161 Ill., 239, 240-242.
Lightcap *v.* Bradley, 186 Ill., 511, 515-536.
Bradley *v.* Lightcap, 201 Ill., 510, 512-524.
Bradley *v.* Lightcap, 202 Ill., 154, 155-168.

(For cases in this court see):

Wheeler *v.* Jackson, 137 U. S., 245, 255, 258.
Jackson *v.* Lamphier, 3 Pet., 280, 290.
Turner *v.* New York, 168 U. S., 90, 94.
Terry *v.* Anderson, 95 U. S., 628, 632.
Saranac L. Co. *v.* Comptroller, &c., 177 U. S., 318, 330.
Vance *v.* Vance, 108 U. S., 514, 519.
Koshkonong *v.* Burton, 104 U. S., 668, 675.
Iowa Central R. R. Co. *v.* Iowa, 160 U. S., 393.
Davidson *v.* New Orleans, 96 U. S., 102.
Missouri Pacific R. R. Co. *v.* Humes, 115 U. S., 512, 518.

III.

In Illinois the title to land mortgage is never out of the mortgagor, except as between him and the mortgagee, and then only as an incident of the mortgage debt for the sole purpose of obtaining satisfaction. As to all other persons and for all other purposes the mortgagor or his grantee is the legal owner of the mortgaged estate.

Fitch *v.* Pinckard, 4 Scaman, 69, 82, 83.
Sargent *v.* Howe, 21 Ill., 149.
Van Sant *v.* Allmon, 23 Ill., 30, 33.
Hall *v.* Lance, 25 Ill., 277, 281.

Harris *v.* Mills, 28 Ill., 44, 46.
Pollock *v.* Mason, 41 Ill., 516, 520.
Emory *v.* Keighan, 88 Ill., 482, 485.
Delano *v.* Bennett, 90 Ill., 533, 536.
Barrett *v.* Hinckley, 124 Ill., 46.
Lightcap *v.* Bradley, 186 Ill., 518, 524.
Ware *v.* Schintz, 190 Ill., 189.

In the case at bar before the statute had any person or anything to operate upon it had been in force over seven years as the bill shows, and the obligation of the contract had been enforced. The foreclosure and sale extinguished the trust deed, and freed the land from all lien and claims except the lien of the certificate of purchase; and from and after the sale a new relation created by the statute existed. Thereafter the plaintiff in error sustained the same relation to the property and to the mortgagor that any stranger would sustain if such stranger had been the purchaser instead of the plaintiff in error.

Ogle *v.* Koerner, 140 Ill., 170, 179, 180.
Seligman *v.* Laubheimer, 58 Ill., 124, 126.
Davis *v.* Dale, 150 Ill., 239, 243-4.
Smith *v.* Smith, 32 Ill., 198.
Raines *v.* Mann, 68 Ill., 264.
State Bank *v.* Wilson, 4 Gilm., 57, 59.
Wyman *v.* Cochran, 35 Ill., 152, 156.
Leslie *v.* Bontel, 130 Ill., 501.
Kilgore *v.* Wood, 64 Ill., 345.
U. S. Mortgage Co. *v.* Gross, 93 Ill., 483.
Walker *v.* Warner, 179 Ill., 16.
Lightcap *v.* Bradley, 186 Ill., 510.

The foregoing authorities also show that the certificate of purchase was only a lien, that no title passed to the holder of it, and that none vested in her until the deed is made, and that until the deed is made the holder of it is not even entitled to possession. The following are further authorities upon this point:

Hayes *v.* Cassell, 70 Ill., 669, 672.
Bennet *v.* Matson, 41 Ill., 332, 344.
McLagan *v.* Broan, 11 Ill., 519, 523.
Johnson *v.* Bantock, 38 Ill., 111.
O'Brien *v.* Fry, 82 Ill., 274, 277.
Rockwell *v.* Servant, 63 Ill., 425.
Huftalin *v.* Misner, 70 Ill., 55, 58.
Kelholts *v.* Wolf, 8 Ill., App. 371, 374.
Trustees of School *v.* Love, 34 Ill., App. 419, 420-1.
Whitenack *v.* Agarth, 56 Ill., App. 72, 77.

IV.

The bill on its face shows that the plaintiff in error under the law of Illinois had no legal or equitable title to support her bill.

Ryhiner *v.* Frank, 105 Ill., 326, 330.
Peterson *v.* Emmerson, 135 Ill., 55, 60.
Seeberger *v.* Weinberg, 151 Ill., 369, 380.
Brown *v.* Ridenhower, 161 Ill., 239.
Lightcap *v.* Bradley, 186 Ill., 511.
Bradley *v.* Lightcap, 202 Ill., 154.
Bradley *v.* Lightcap, 201 Ill., 510.

V.

The bill shows, and so states, that the controversy in the ejectment suit was as to the effect of the statute complained of. This involved its validity and construction, and it is the construction and effect the Supreme Court gave to it that forms the chief ground of complaint in the bill. This being true, the principles of law announced by the State Supreme Court on the appeal, in the ejectment suit and found in Lightcap *v.* Bradley, 186 Ill., 515 to 536, became the law of the case alike binding on all courts especially as to the construction and effect of the statute, until reversed by this court, which alone has supervisory power over the decisions of the State Supreme Court.

Washington Bridge Co. *v.* Stewart et al., 3 How., 424, 425.
Pease *v.* Ditto, 189 Ill., 456, 461.
Reed v. West et al., 70 Ill., 479.
Manufacturing Co. *v.* Wire Fence Co., 119 Ill., 30, 42.
Newberry *v.* Blatchford, 106 Ill., 584, 591-2.
Rising *v.* Carr, 70 Ill., 596.
Ogden *v.* Larrabee, Admr., 70 Ill., 510, 512.
Harvey *v.* Aurora & G. Ry. Co., 186 Ill., 283, 294.
Sampel *v.* Anderson, 4 Gilm., 546.

ARGUMENT.

I.

An examination of the prayer of the bill will furnish light upon what the bill is predicated. The prayer is that the defendant in error be required to convey to the plaintiff in error all his interests in the property; that he be enjoined from asserting ownership in the land, taking possession thereof, dispossessing the complainant or denying her title thereto; and alternately that he be permanently enjoined from prosecuting the ejectment suit, that the deed from Prettyman to him be ordered surrendered for cancellation; that the same be declared a cloud upon complainant's title, and that her title be declared confirmed and established by the decree of the court, and she be confirmed in her possession of the land.

This practically amounts to the destruction of the title asserted by Lightcap in the ejectment suit, and the confirmation in the plaintiff in error of a perfect indefeasible title to the premises. In other words, the prayer is, in spite of the fact that she disregarded the statute in question, and thereby lost all her claims to the premises, she is, by the decree of the court, to be invested with a perfect title.

In substance, this amounts to the annulment of the

statute in question, obviates its operation, disregards its provision, treats it as though absolutely void. Such disregard of the statute must be predicated upon the proposition that the statute is a nullity. If it is a nullity, it is because it contravenes the Federal Constitution. If it is void because it contravenes the constitution, then it will be so regarded in courts of law as well as in courts of equity. It follows therefore that if the premises upon which the relief is sought are well founded, there is no occasion to seek the aid of a court of equity. A court of law will disregard a statute that violates the constitution and a court of equity need not be called upon for that purpose. Indeed, it is not one of the heads of equity jurisprudence to inquire into the constitutionality of statutes, and to set them aside if they violate the constitution. This is especially the case where the construction and validity of the statute is involved in a suit at law between the same parties and involving the same subject-matter of litigation. The functions of a court of law are sufficiently comprehensive for that purpose. If the statute of a State violates the Federal Constitution, the courts of law of that State have perfect authority to so declare, and it is their duty to so declare in any proceeding before them where the validity of the statute arises, and if the highest court of the State erroneously upholds such statute, its action may be corrected by a writ of error from the Federal Supreme Court. Moreover, it is never deemed one of the functions of a court of equity to exercise appellate jurisdiction over proceedings of law courts. If a court of law erroneously sustains a statute, or erroneously interprets a statute, or erroneously extends the provision of a statute to cases not within its terms, this affords no ground for equitable interference. The error supposed is one of law to be corrected by a tribunal exercising purely appellate jurisdiction, and the remedy at law is perfect and complete. While on the other hand, if the State statute is valid in law it is also valid in equity, and equity will follow the law in its construction.

II.

In the second division of our brief we have called the court's attention to decisions of the Supreme Court of Illinois defining and construing the statute complained of; as we shall have occasion to refer to these cases in a subsequent part of our argument we wish here merely to refer to the fact that that court in each and every one of those cases holds the statute to be one of limitation and valid. The first of those cases was decided nearly twenty years before the bill was filed in this case, and within two years after the plaintiff in error was entitled to a deed on the certificate, leaving her three years after the decision of the Supreme Court in Frank *v.* Ryhiner *supra* in which to take her deed. She was bound to know what the law of the State was, besides that decision was notice to her and to every other citizen of the State that if they failed to comply with the plain provisions of the statute they would lose their right to a deed and would have no further right to the land described in the certificate of purchase.

That this statute did not contravene any provision of the Federal Constitution seems to us beyond question. This court has frequently passed upon the question of the validity of similar statutes and in every instance as far as we are able to find has held them to be valid. At the risk of repeating what we have already said in No. 243 on the docket of this court, of which this case is a branch, we will call the court's attention to some of the decisions of this court. In the case of *Wheeler v. Jackson*, 137 U. S., 245, the plaintiff in error, Wheeler, held a number of certificates of purchase, which entitled him to a conveyance or lease of the property called for in the certificates. At the time he purchased the property and received his certificates, the owner of the property had two years in which to redeem the same from the sale, and if redemption was not made within that time the holder of the certificates had an *absolute* right to a conveyance or lease, and the right to abide his time in calling for the conveyance. Subsequently the legisla-

ture of New York passed an act which provided that no special proceedings should be maintained to compel the execution of the conveyance upon any sale made more than eight years prior to the passage of the act unless brought within six months thereafter, and that after the lapse of six months all sales made more than eight years prior to the passage of the act *should be cancelled, and the lien of the certificate should cease.* The certificates which Wheeler held were obtained on sales made more than eight years prior to the enactment of the statute. He did not apply for any conveyance until after the expiration of the six months limitation prescribed by the act, but subsequent to the expiration of the six months he did apply for the conveyance the certificates called for. The conveyance was refused on the ground that he had lost his rights by the bar of the statute, although but for the subsequent act of the legislature his certificate would have been perfectly good and he would have been entitled to his conveyance. He brought suit to compel the execution of the conveyances which his certificates called for, was defeated in the State courts, and the case was brought to this court and it was insisted that the act of the legislature was unconstitutional as impairing the obligation of the contract, also that the act deprived him of property without due process of law contrary to the Fourteenth Amendment. But this court held the statute to be valid as a limitation statute and after stating (p. 255) that it is the settled doctrine of this court that the legislature may prescribe a limitation where none existed before as well as shorten the time for the enforcement of existing rights provided a reasonable time be given before the bar takes effect, the court speaking through Mr. Justice Harlan, said (p. 256):

"It is further contended that even if the statute is "sufficient to bar an action to compel the execution of "a conveyance to the purchaser unless brought within "the time prescribed, it is unconstitutional in that it re- "quires the Register after the expiration of six months "from its passage without any such action being com- "menced, and notice thereof given within that period--

"to cancel in his office all sales made more than eight "years prior to June 6, 1885—and provided that 'there- "upon the lien of all such certificates of sale shall cease "and determine.' That provision it is said destroys the "security upon which the purchaser relied when he ad- "vanced the money, namely, the lien of the record after "sale. This position is untenable. *The substantial "rights acquired by the purchase was a return of his "money with interest, or, after a certain time, a lease of "the premises for the term named in the certificate of "sale.* The lien created by the certificate of sale pro- "tected him during the period which the owner of the "property was permitted to redeem; and if the latter "redeemed, he could only do so, of strict right, within "a given time, and then only by reimbursing the pur- "chaser all he had paid, with the addition of 15 per cent. "per annum. If there was no redemption, the purchaser "was entitled to a lease that would give him all for "which he bargained. The lien, consequently, would "cease upon the execution and delivery to the purchaser "of the lease. If the lien was of such a character that "the purchaser, not having secured a conveyance, could "enforce it by suit or special proceedings commenced "for that purpose, the power of the legislature to pre- "scribe a period within which such suit or proceeding "must be commenced, or the lien lost, is as clear as its "power to fix the time within which the purchaser must "sue to compel the execution of a conveyance or lease. "If, on the other hand, the lien was given only to pro- "tect the purchaser in respect to his outlay with inter- "est, until he was entitled to demand a conveyance or "until a conveyance was actually made, the power of the "legislature to require the record of sale to be cancelled "and the lien to cease when the purchaser by not suing "within the prescribed time had lost his right to a con- "veyance or lease, can not be questioned."

And the court held the statute was valid and in its conclusion said, p. 258:

"A statute of limitation can not be said to impair the "obligation of a contract, or to deprive one of property "without due process of law, unless in its application to

"an existing right of action, it unreasonably limits the "opportunity to enforce the right by suit."

It appears to us that the holder of the certificate of purchase in the foregoing case of Wheeler *v.* Jackson presented to this court a much stronger case for the interposition of this court on the ground that the act was unconstitutional than is presented by the plaintiff in error in the case at bar. In the above case the sale was made and the certificates were in the hands of Wheeler in full force and effect with the right to delay taking out the conveyance unaffected by any statute when the legislature passed the limitation statute; every right which the sale, or the certificates gave were vested so far as the sale and certificates could vest the same, and the right of redemption as completely barred and gone as in the case at bar. In the case at bar the sale had not been made and the certificate had not been issued, and no right by virtue of the sale or certificate was given or vested until seven years after the statute was passed and in force. In the case of Wheeler he lost his right as purchaser by virtue of a limitation statute passed after his right had attached; in the case at bar the plaintiff lost her right as purchaser by virtue of a limitation statute which was in full force and effect at the time of her purchase. The substantial rights acquired in either case were the same. In the Wheeler case this court said:

"The substantial rights acquired by the purchase was "a return of the money with interest, or, after a certain "time, a lease of the premises for the term named in the "certificate."

The substantial rights which the plaintiff in error acquired by her purchase were the same, as the State Supreme Court said:

"The statute gave her the right to receive the amount "of her bid, with interest, in case of redemption, and in "case there was no redemption, to receive a deed within "five years after the expiration of the period of redemp- "tion."

No other right could be acquired under a valid foreclosure and sale either before, at the time, or since the

McCune trust deeds ~~were~~ was executed, except the right to receive the redemption money, if redemption be made, or a deed in case of failure to redeem.

The parties to a contract have no more vested right or interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. On the contrary, the legislature may provide a limitation where *none existed before*, as well as shorten the time within which suit to enforce existing action may be commenced, or act performed, provided a reasonable time, taking all the circumstances into consideration, be given by the legislative act prescribing the limitation for the commencement of the action or the performance of the act, before the bar takes effect.

Terry *v.* Anderson, 95 U. S., 628, was a case where the cause of action on the obligations had been running nearly four years, and under the law as it then existed, the creditor had 20 years in which to bring suit. Subsequently the legislature of Georgia passed an act limiting the period in which suit on such past due obligation should be brought by January 1, 1870, which gave the creditor only 9 months and 17 days in which to bring his action. It was insisted that the act was unconstitutional, because it impaired the obligation, and the argument was made in that case along the same line as the case at bar, that as the statute of limitation in force when the liability of the defendant was incurred did not bar the action until the expiration of 20 years from the time the action accrued, a statute passed subsequently, reducing the limitation, was such an impairment of the contract as to render the statute void. This court, however, held the act valid. Chief Justice Waite in delivering the opinion of this court said (p. 633-4): "This court has often decided that statutes of "limitation affecting existing rights are not unconstitu- "tional if a reasonable time is given for the commence- "ment of an action before the bar takes effect." (Citing Hawkins *v.* Barney, 5 Peters, 451. Jackson *v.* Lamphier, 3 Peters, 280. Sohn *v.* Waterson, 17 Wall, 596. Christian *v.* Russell, 5 Wall, 290. Sturges *v.* Crowninshield, 4 Wheat, 122.) "It is difficult to see why if the

"legislature may prescribe a limitation where *none* ex-"isted before, it may not change one which has already "been established. The parties to a contract have no "more *vested* interest in a particular limitation which "has been fixed than they have in an unrestricted right "to sue. They have no more a vested interest in the "time for the commencement of an action than they have "in the form of the action to be commenced, and as to "the form of action, or mode of remedy it is well settled "that the legislature may change them at discretion, "provided adequate means of enforcing the right re-"mains. *In all cases, the question is one of reasonable-"ness, of that the legislature is primarily the judge, and "we can not overrule the decision of that department of "the government unless a palpable error has been com-"mitted.*"

The case of Koshkonong *v.* Burton, 104 U. S., 668, 674, is if anything, a still stronger case in support of our position.

In Jackson *v.* Lamphier, 3 Peters, 281, 289-290, this court said: "It is within the undoubted power of the "State legislature to pass recording acts, by which the "elder grantee shall be postponed to a younger if the "prior deed is not recorded within the limited time, and "the power is the same whether the deed is dated *before* "or after the passage of the recording act. Though the "*effect* of such law is to render the prior deed *fraudu-"lent* and *void* as to subsequent purchasers, it is not a "law impairing the obligation of contract, such too, is "the power to pass acts of *limitation* and *their effect*.

"Reason and sound policy have led to the general "adoption of laws of both description, and their validity "can not be questioned. The time and manner of their "operation, the exceptions to them, and the acts from "which the time limited shall begin to run, will gen-"erally depend on the sound discretion of the legisla-"ture, according to the nature of the title, the situation "of the country, and the emergency which leads to their "enactment."

Vance *v.* Vance, 108 U. S., 514, was a case where the Civil Code of Louisiana, provided in respect to tutors of

minors, as follows: "The property of the tutor is "tacitly mortgaged in favor of the minor from the day "of his appointment as tutor, as security for his admin- "istration and for the responsibility which results from "it." There was a tacit mortgage under this law which had been in full force and virtue from October 15, 1859. In 1868, the State adopted a new constitution in which it provided "that no mortgage or privilege shall here- "after affect third parties unless recorded in the parish "where the property to be affected is situated. The "tacit mortgages and privileges now existing in the "State shall cease to have effect against third persons "after 1st of January, 1870, unless duly recorded. The "General Assembly shall provide by law for the regis- "tration of all mortgages and privileges."

This, the legislature proceeded to do on the 8th day of March, 1869. This court in the foregoing case, upheld the validity of that clause of the State Constitution, and in doing so said (p. 517): "It is in the nature "of a statute of limitation, the right to prescribe the "time within which existing rights shall be prosecuted, "and means by and conditions on which they may be "*continued in force* is, we think, undoubted. Otherwise, "when no term of prescription exists at the inception "of a contract, it would continue in perpetuity, and all "laws fixing a limitation would be abortive. Now, "it is elementary, that a State may establish, alter, "lengthen or shorten the period of prescription of exist- "ing rights; provided that a reasonable time be given "in future for complying with the statute."

There is nothing in principle in this statute, or in this case, differing from any other statute of limitation, or case where substantial rights are lost under a statute of limitation like the one in question. In *Sarmaac L. Co. v. Comptroller*, 177 U. S., 330, this court said:

"A statute of limitation will bar any right, however "high the source from which it may be derived, provided "a reasonable time is given a party to enforce his right."

On pp. 30, 31, of argument for plaintiff in error, it is said:

"The statute without doing any violence whatever in

"no language might have been held not retroactive, and "so inapplicable to affect vested rights or rights under "mortgage previously made, or the rights of persons in "possession of land who had no need of any master's "deed. It might have been applicable only to prevent "the issue of a master's deed leaving all existing rights "unaffected. It might have been interpreted according "to its terms, that it affected only the certificate of pur- "chase, but not the purchase itself or the deeds or "rights of the purchaser in possession. If the statute of "1872 had been so constituted as to avoid the construc- "tional objection it must have been held to have no op- "peration to the plaintiff in error who was in rightful "possession, claiming title under a contract made prior "to its passage."

What construction was given to it, other than as preventing her from getting a master's deed after five years? The statute said the certificate should be void *after five years*, and that is all the court said. The trouble is, the court did not agree with counsel as to the nature of the rights of the mortgagee, the *cestui que trust* and mortgagor, the effect of a valid foreclosure and sale upon the mortgage lien, the relation which the purchaser at the master's sale whoever he might be, whether the mortgagee, *cestui que trust*, or a stranger, thereafter sustained to the mortgage premises and mortgagor, and the rights of such purchaser to the possession of the premises before obtaining a deed from the master. These were questions quite apart from the statute complained of. They involved an inquiry as to the nature and character of a mortgage, the relation the mortgagee and mortgagor sustained to each other, and to the mortgaged premises, and to third parties; how the mortgage lien was affected by the foreclosure and sale, what relation and position the purchaser at the sale sustained, and what he thereby acquired.

These matters were as they were before the statute. The fault of the opinion, as the learned counsel say it, was the views taken by the court on those collateral subjects which we will discuss further on. It is as much *the duty* of the court to give effect to the statute of limi-

[illegible] as to any other statute which the legislature of a State may be disposed to pass and where the evil of the legislation is clearly expressed, as it was in the statute under consideration, it ought to be followed without regard to consequences.

Where was it ever held that a complainant in chancery could secure relief against [illegible] consequences of his own neglect to comply with a [illegible] requirement of a statute? Such a suitor can not gain the favor of equity. That court will not undertake to nullify the provisions of a statute merely because one who has been guilty of it is suffering in consequence thereof. "If the law "commands or prohibits a thing to be done, equity can "not enjoin the contrary or dispense with the obligation." Story's Eq. Jur., Sec. 64.

[illegible]

It does not appear quite clear in the brief and argument of the learned counsel what change in the law of Illinois they impute to the court. On page 15 of their brief and argument, they say, "In some change in the "law of Illinois made either by statute or change in the "rule of decision, or both, after the rights of the plaintiff in error became vested," the court is about to deprive her of property, etc., etc. This is quite as indefinite statement, and when we come to further examine their argument it is rendered still more so. When they get to talking about the rights of the plaintiff in error which they claim she has been deprived of in this unfortunate way, it does not clearly appear whether they refer to rights as vested pro tanto before foreclosure of the trust deed, or rights as purchaser at the foreclosure sale, and in all of their discussion they ignore the effect of the foreclosure and sale.

In order to take the case up and consider it in as orderly way [illegible] as consider the opinion of the State Supreme Court in which the bill changes, and counsel argue, the change in "some way" was made. The opinion is made a part of the bill by reference as Exhibit C [illegible], but is not copied, except a portion of it,

into the bill, nor attached, but will be found in the 186 Ill., 515 to 536.

One of the changes which they claim was made, has reference to the law of mortgages in Illinois, and what the respective rights, title and interest of the mortgagor and mortgagee in and to the mortgaged premises are and were. They claim that the mortgagee, after condition broken, "had the absolute title and estate" precisely as he had at one time in England, and that the mortgagor thereafter had no right, title or interest in the premises recognized by a court of law, and that the decision of the court in Lightcap *v.* Bradley changed the law in this respect.

Let us see, by turning to the opinion of the court and examining what the court said on pages 518-524 this court will find the State Supreme Court carefully reviewed the law of mortgages as it existed in Illinois before, at the time, and ever since the McCune trust deed was executed. That this court may have a ready reference we will quote what the State Supreme Court said in that regard, after stating that it was insisted that the trust deed was a conveyance of the fee to Johnson with only an equitable right on the part of the mortgagor to redeem; and that upon default the fee simple title was in the trustee and that such title remained in him unaffected by the foreclosure and sale (and that is practically what is insisted upon now), the court said:

"Leaving out of consideration the effect of a mort-
"gage in the statutory form, it is true that a mortgage
"or trust deed like the one in question here, which pur-
"ports to convey title, does, as between the mortgagor
"and mortgagee, convey such title; but it is only a quali-
"fied conveyance of the land, and the mortagor parts
"with the title only as security to his creditor and dur-
"ing the existence of the debt or obligation. In the de-
"velopment of the law of real estate mortgages in Eng-
"land the mortgage was at first a pledge of the land,
"usually requiring a judgment to complete a transfer
"of titles, and to invest it in the mortgagee. Afterwards
"a form of mortgage came into use which vested title of
"itself, and the pledge changed into an estate in fee

"without judicial foreclosure upon the mortgagor's de-
"fault. The mortgage vested absolute title in the mort-
"gagee upon condition broken. Courts of equity, how-
"ever, recognizing the purpose of the mortgage as
"merely a pledge to secure a debt, established a right of
"the mortgagor to redeem. They created a new estate in
"the form of the equity of redemption, and a remedy for
"the creditor to cut off this estate. A proceeding was
"devised to extinguish the mortgagor's right to redeem,
"and to vest title in the mortgagee, and this was the pro-
"ceeding now known as strict foreclosure (9
"Ency. of Pl. & Pr. 118). Equity assumed jurisdiction
"to relieve the mortgagor against a forfeiture upon de-
"fault, and he was relieved from it on payment of the
"debt. (1 Jones on Mort., Sec. 8.)

"Courts of law, following the lead of courts
"of equity, have adopted many equitable princi-
"ples as to the title of the respective parties,
"and at law the title of the mortgagee can be used only
"for the purpose of securing his equitable rights under
"it 'as to all persons except the mortgagee and those
"claiming under him it is everywhere the established
"modern doctrine that a mortgagor in possession at law
"both before and after breach of condition is the legal
"owner.' (Jones on Mort., Sec. 11.) In many of the
"States a mortgage confers no title or estate, and it is
"nothing but a mere security for a debt or obligation.
"This State has adhered to the rule that at law a title
"vests in the mortgagee, but only for the protection of
"his interests. For the purpose of protecting and en-
"forcing his securities, the mortgagee may enter and
"hold possession by virtue of his title, and take the rents
"and profits in payment of his mortgaged debt. He may
"maintain the possessory action of ejectment on the
"strength of such title, but the purpose and effect of the
"action is not to establish or confirm title in him, but, on
"the contrary, to give him the rents and profits which un-
"dermine and destroy his title. (U. S. Mort. Co. *v.*
"Gross, 93 Ill., 483.) When the rents and profits have
"paid the mortgaged debt both the title and right of pos-
"session of the mortgagee are at an end.

"The mortgagor's interest in the land may be "sold upon execution; his widow is entitled to "dower in it; it passes as real estate by his de- "vise; it descends to his heirs, by his death, as real es- "tate; he is a free holder by virtue of it; he may main- "tain an action for the land against a stranger, and the "mortgage can not be set up as a defence. The mort- "gagee has no such estate as can be sold on execution; "his widow has no right of dower in it; upon "his death the mortgage passes to his personal "representatives as personal estate, and it passes "by his will as personal property. (1 Jones on "Mort., Sec. 15.) The title of the mortgagee, even af- "ter condition broken, is not an outstanding title of "which a stranger can take advantage, but it is availa- "ble only to the mortgagee or one claiming under him "(*Hall v. Lance*, 25 *Ill.*, 277). The mortgagor may sell "and convey his title or mortgage it to successive mort- "gagees, and his grantees or mortgagees will succeed to "his estate and occupy his position subject to the incum- "brance.

"*Fitch v. Pinckard*, 4 Scam., 69, was an action of "ejectment, and there was a question whether the equity "of redemption was liable to execution and would pass "to the purchaser at the execution sale. The court hold- "ing that it would pass said that the earliest doctrine "in England settled that the whole estate was in the "mortgagee, but that the strictness of law had yielded "to the principles of justice and equity and the doctrine "held in the United States in regard to the estate of the "mortgagor is that he is to be treated as the real owner "of the estate for all beneficial purposes, subject only to "the right and incumbrance of the mortgagee.

"*Cottingham v. Springer*, 88 *Ill.*, 90, was also an ac- "tion of ejectment, where the same question arose, the "court cited *Fitch v. Pinckard*, *supra*, and reiterated "what was there said. After referring to the common "law rule and that the mere equitable rights of the mort- "gagor could not be sold on execution the court said (p. "93): 'But many of the States—and ours of the num- "ber—have by enactment made great modifications of

"the rule. Our legislature at an early day provided "that when the mortgagor paid and satisfied the debt, "and the mortgage had been recorded he might compel "the mortgagee to enter satisfaction of the mortgage on "the margin of the record which should operate as a dis-"charge and release of the same, and forever bar all ac-"tion that might be brought thereon. This provision is "found in the act establishing recorder's office (Pub. "Laws 1819, p. 19, Sec. 5), and has been continued in "force ever since. This was a most material modifica-"cation of the common law rule, as it reinvested the "mortgagor with the title simply by the mortgagor "stating, over his signature, on the margin of the record, "that he had received satisfaction of the debt, and dis-"pensing with a release or reconveyance for the pur-"pose.' The court also said that the provisions for a "foreclosure at law by *scire facias* and sale of the prop-"erty under an execution at law recognized the equity "of redemption as an interest or title that might be sold "on execution subject to the same incidents that other "sales of real estate are under when sold under ordinary "executions at law.

"*In Barrett v. Hinckley, 124 Ill., 32*, which was an ac-"tion of ejectment by Hinckley *v.* Barrett and others "the courts held that the title of the mortgagee existed "only for the benefit of the holder of the mortgage in-"debtedness, and can only be asserted by an action in "furtherance of his interest as a means of coercing the "payment of the debt; that if a mortgagee conveys the "mortgaged premises without assigning the debt, the "grantee will hold the legal title in trust for the holder "of the debt, and that the mortgagee's interest as dis-"tinct from the debt has no determinate value and is "not fit subject for assignment. The court also says "(p. 46):

"'It must not be concluded from what we have said "that the dual system respecting mortgages as above ex-"plained, exists in this State, precisely as it did in "England prior to its adoption in this country, for such "is not the case. It is a conceded fact that the equitable "theory of a mortgage has, in process of time, made in

"this State, as in others, material encroachments upon "the legal theory which is now fully recognized in courts "of law. That it is now the settled law that the mort- "gagor or his assignee is the legal owner of the mort- "gaged estate as against all persons except the mort- "gagee or his assignee (*Hall v. Lance*, 25 Ill., 277; "*Emory v. Keighan*, 88 Ill., 482). As a result of this "doctrine, it follows that in ejectment by the mortgagor "against a third party, the defendant can not defeat the "action by showing an outstanding title in the mortgagee. "(Hall *v.* Lance), so, too, courts of law now regard the "title of a mortgagee in the nature of a base or deter- "minable fee. The term of its existence is measured by "that of the mortgage debt. When the latter is paid off, "or becomes barred by the statute of limitations, the "mortgagee's title is extinguished by operation of law "(*Pallock v. Maison*, 41 Ill., 516; *Harris v. Mills*, 28 id. "44; *Gibson v. Rees*, 50 id. 383). Hence the rule is as "well established at law as it is in equity, that the debt "is the principal thing, and the mortgage an incident.'

"The mortgagee is legal owner for only one purpose, "while at the same time the mortgagor is the owner for "every other purpose and against every other person. "The title of the mortgage is anomalous and exists only "between him and the mortgagor and for a limited pur- "pose.

"*Delano v. Bennett, 90 Ill., 533*, was an action of "ejectment, E. T. Warren, the owner of two-fifths of the "land in controversy, mortgaged the same to the Ken- "nebec Bank of Maine. The bank conveyed said two- "fifths interest to Benjamin Wales and others, and "Delano claimed the same through mesne conveyances "from the grantee of the bank. It was held that the deed "from the bank purporting to convey this two-fifths in- "terest did not convey anything and the court said (p. "536) 'the mortgage is deemed a mere incident to the "mortgage debt and the conveyance of the interest of the "mortgagee in the land without an assignment of debt "is considered in law a nullity.' The title is never out "of the mortagor except as between him and the mort- "gagee and as a incident of the mortgage debt for the

"purpose of obtaining satisfaction. When the debt is "barred by the statutes of limitation the title of the "mortgagee or trustee ceases at law as well as in equity. "When the debt, the principal thing is gone, the incident, "the mortgage, is also gone. (*Pollock v. Maison*, 41 Ill., "516.) The mortgagor's title is then freed from the title "of the mortgagee, and he is owner of the premises, not "by any new title, but by the title which he always had. "Statutes of limitation do not transfer title from one to "another, and a statute of limitation which would have "the effect of transferring the legal title back from the "mortgagee to the mortgagor would be unconstitutional "(*Newland v. Marsh*, 19, Ill., 376). The title of the mort-"gagor becomes perfect because the title of the mort-"gagee is measured by the existence of the mortgage "debt or obligation and terminates with it. *Barrett v.* "*Hinckley supra.* According to these well established "rules of law, Benjamin S. Prettyman was the owner of "the premises in question when the notes secured by the "trust deed became due, except as against the title held "by the trustees for the purpose of enforcing payment of "said notes."

By an examination of the autorities cited by the court in that part of its opinion above quoted, it will be found that they fully sustain the court in what they said. In addition thereto this court will find the same doctrine announced in *Sargent v. Howe*, 21 Ill., 148, and *Van Sant v. Allmon*, 23 Ill., 30; both of which were chancery proceedings and decided in 1859. It has been the law of Illinois from the earliest time to the present day that instead of the title of the mortgagee becoming "absolute" on condition broken, he at no time has the "absolute" title, but that the title, or fee, as it is sometimes spoken of, conveyed to him by the mortgage, is a base or determinable fee the term of its existence being measured by that of the mortgage debt, and that independent of the debt he has no title.

Even this honorable court, as far back as 1824 in Hughes *v.* Edwards, 9 Wheat, 497-500, in determining whether the mortgagee or mortgagor was the real owner of the premises mortgaged, held that the mortgagor was

in reality the owner of the land, subject only to the lien. "So much the owner," says the court, "that he is not ac- "countable for the rents and profits received by him dur- "ing the continuance of his possession even although "the land, when sold, should be insufficient to pay the "debt."

And in Hutchison *v.* King, 1 Wall, 53, in determining the rights, title, interest and estate which the mortgagor and mortgagee respectively held in and to the mortgaged premises, this honorable court speaking through Mr. Justice Field said: "A mortgage is in *form* a convey- "ance vesting in the mortgagee upon its execution a con- "ditional estate which becomes absolute upon breach of "condition. At law it was *originally* held to carry with "it all the rights and incidents of ownership, the right of "the mortgagee to be treated as owner of the mortgaged "premises could only be defeated upon the performance "of the condition annexed by the day designated. Subse- "quent performance only gave a right to the mortgagor "to resort to a court of equity for relief from forfeiture "arising upon breach of condition. Such is the law at "this day in some of the States of the Union. But in a "majority of the States the law in this respect has been "greatly modified by consideration drawn from the ob- "ject and intention of the parties in executing and re- "ceiving instruments of this character. The doctrine es- "tablished by courts of equity, looking through the form, "to the real character of the transaction, that a mort- "gage is a mere security for a debt and creates only a "lien or incumbrance, and that the equity of redemp- "tion is the real and beneficial estate in the land, and "may be sold and conveyed in any of the ordinary modes "of transfer subject only to the lien of the mortgage has "to a great extent by 'a judicial and almost insensible "progress,' as Kent observes, been adopted by courts of "law. To such a degree has this equitable view prevailed "that the interest of the mortgagee is now generally "treated by courts of law as real estate only so far as it "may be necessary for the protection of the mortgagee "and to give him the full benefit of his security. Al- "though in the absence of stipulation as to the posses-

"sion, he may enter upon the premises, his interest is "widely different from that of owner. He can not, by "conveyance, transfer any interest in the premises with- "out a transfer of the debt secured. His interest is not "subject to attachment or seizure on execution, he can "not remove the buildings on the premises, nor the fix- "tures attached, nor can he subject the premises to any "use but such as may furnish the means for the payment "of the debt secured without impairing the value of the "estate."

The title, interest or estate which the mortgagee holds under the mortgage, lacks every element incident to the title, interest and estate of the "real" or "absolute" owner; while that of the mortgagor both before and after condition broken has attached to it every incident of absolute ownership.

Let us now consider some of the other propositions which are made the basis of their brief and argument. We invite the court's attention to Division 7 on page 12 of their brief and argument (No. 1). There they say:

"If said statute of 1872 be held unconstitutional or "inapplicable to effect her rights under the mortgage, "or if it were given a construction within constitutional "limits as a statute of limitations—for instance, that "unless the master's deed be taken within the time lim- "ited no deed shall be thereafter issued—plaintiff in "error can maintain her bill and was entitled to the "relief prayed. She had a vested equitable title from "and after January 27, 1881, as *cestui que trust* under "the mortgage trust deed as purchaser and certificate "holder in possession, absolutely entitled to a deed of "the legal title. And she had the legal title by convey- "ance from the heirs at law of the trustee in the mort- "gage deed. She is therefore entitled to have the cloud "created by Prettyman's deed to defendant in error "removed, and defendant in error enjoined from further "asserting the said title against her at law."

(No. 2) Again on page 19 of their brief and argument they say:

"The *cestui que trust* in a trust deed after condition "broken is in equity the absolute owner of the title, just

"as at law the trustee is. Consequently, the plaintiff in "error, after breach of condition, was in equity the "absolute owner of the title and right of possession, as "she would have been at law had she been the mortga- "gee, and her possession after condition broken was the "rightful possession of the mortgagee."

(No. 3) Again at the bottom of page 25 and top of page 26 of their brief they say:

"By the law of the mortgage contract the legal title "outstanding in the trustee in the mortgage deed, after "the sale, was held in aid, and in trust for the pur- "chaser at the sale, in case there was no redemption "from the sale within the time limited. The mortgagor "has not any interest therein after his right to redeem "has expired. Moreover, in the foreclosure suit here "the trustee in the trust deed, Johnson, who held the "legal title was not made a party to the suit. The legal "title in him therefore was not affected by the decree "of sale. That legal title was conveyed by his heirs to "Mrs. Bradley."

(No. 4) Again, on pages 44 and 45, of their brief, they say:

"By the law of the land at the date of the breach of "condition in the McCune mortgage the legal title "became vested in the trustee, Johnson, for use of "plaintiff in error. She therefore had a vested equi- "table title to the land. She was entitled to possession, "which she secured without objection. She might have "proceeded to acquire the legal title by advertisement "and sale, or by foreclosure in equity. She chose the "latter course in hopes of securing other relief also. She "prosecuted her foreclosure to decree and sale, became "the purchaser, and secured a certificate of purchase; "here the effort to secure the legal title seems to have "ended, no one knows why. It is now claimed by "defendant in error and declared by the Supreme Court "of Illinois, that the proceedings to foreclose superseded "the authority to the trustee to sell and convey the "legal title, and this may be true. If so, then plaintiff "in error can never secure the legal title, and must be

"content with the equitable title she held as *cestui que* "*trust*, and which she has protected by maintaining her "possession and by purchasing at the master's sale. "This was done in aid of her equitable title and not in "derogation of it."

Here are some singular propositions both of law and fact to say the least. And they are none the less singular on account of what they contain than they are on account of what they attempt to exclude from the consideration of the case, namely, the effect of the foreclosure and sale in all its bearings. (We have numbered these propositions 1, 2, 3 and 4 for easy reference.) The last part of number 1 and 3 in their practical effects involve the same matter which is a question of fact as to whether or not Johnson, the trustee, was a party to the foreclosure proceedings and bound by the decree therein. By reference to the bill in this case the court will see (P. R., top page 7) that she avers that the bill which she filed in March, 1872, in pursuance of which the trust deed was foreclosed, was "against Prettyman, McCune and *all* other persons interested in said real estate." As Johnson was trustee in the trust deed on the identical land this averment is equivalent to saying he was a party to the foreclosure proceedings. But to forever settle that matter the State Supreme Court found he was a party to the foreclosure suit and bound by the decree, that thereafter he had no interest in the premises and that the deed from his widow and heirs conveyed no title, 186 Ill., 530. But if their contention was true that the deed from the widow and heirs of Johnson conveyed to her the legal title then she had a complete defense to the ejectment suit and no cause for filing the bill in equity, as a judgment in bar in the ejectment suit against the plaintiff's title under the deed from Prettyman would as completely remove that deed as a cloud on her title as would a decree in chancery.

She claims she had a vested equitable title as *cestui que trust* under the mortgage trust deed as purchaser and certificate holder in possession absolutely entitled to a deed of the legal title, and if the statute was con-

strued so as to only cut off her right to a deed if not taken within five years it would not be unconstitutional and she could maintain her bill. We respectfully submit that is precisely the construction the court gave the statute. The proposition which is here made practically admits that she must have the right to demand the deed which will convey to her the legal title, in order to support her alleged equitable title, and when she is no longer able to demand such a deed, she no longer has an equitable title upon which to maintain her bill. There is no way and never has been any way suggested, by which the legal and equitable title to the land can be permanently separated under the conditions existing in this case. Proposition No. 2 and the argument which is based upon it has no bearing on the case for the reason it entirely ignores the foreclosure proceeding and its effect, and we will not take up the time of the court in discussing it. By Proposition No. 3 they claim in effect that the legal title still remains in the trustee notwithstanding the foreclosure and sale and that he held the same in trust for the purchaser at the sale in case there was no redemption. (Evidently they realized the legal and equitable title can not be permanently separated without the intervention of a trust, hence this claim.) And the fourth proposition is that notwithstanding it may be true that the foreclosure proceedings superseded the authority of the trustee to sell and convey the legal title and that she can never secure the legal title she still has the equitable title as *cestui que trust*. In other words, that the foreclosure proceedings and sale and her purchase thereat did not change her relation to the property. It is upon these several propositions that she bases her claim or right to maintain her bill.

In determining what rights, if any, the plaintiff in error had, in the premises at the time she filed her bill in this cause, we do not see how the effect of the foreclosure and sale and her purchase thereat can be ignored. There certainly was some change in the relation of the parties to each other and to the premises effected by those proceedings. Without the trust deed she could not

have gone into chancery and obtained any relief in the foreclosure suit. It was that instrument which gave the court jurisdiction to enter the decree of foreclosure and sale and it is a general rule that by decree in chancery the contract or instrument upon which the proceedings are based become entirely merged in the decree. That by the judgment of the court it loses all its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining liabilities are transfered to the decree. When the decree is executed by a sale of the land the only use and purpose of the decree is to show the authority which the master had to make the sale in support of the title acquired by the master's deed.

It is true that when default was made she had several remedies which she might have pursued to collect the debt and apply the land toward its payment, and it is also true that she might have pursued one or more of these remedies at the same time; but she could only have one satisfaction, and whether the doctrine of merger applies or not, when the decree of foreclosure and sale was entered and the land sold, all rights and remedies under the trust deed were exhausted and the mortgage lien extinguished. *Seligman v. Laubheimer*, 58 Ill., 124; Ogle *v.* Koerner, 140 Ill., 170; State Bank *v.* Wilson, 4 Glim., 57; Kilgore *v.* Wood, 64 Ill., 345; Davis *v.* Dale, 150 Ill., 239; Smith *v.* Smith, 32 Ill., 198.

In *Seligman v. Laubheimer, supra*, the court said:

"Without determining the effect of a mere foreclosure, "we do hold that the decree, followed by sale of the "premises, extinguished his mortgage. Plaintiff in error "obtained his decree, caused a sale, because the pur- "chaser, received his certificate of purchase, and then "procured an award for a special execution to make the "residue of the debt; by these acts the mortgage lien was "extinguished. The intention to merge the lien is "clearly deducible from them."

If the language of the court above quoted had been expressly used for this case it could not have fitted the facts any closer. In the case at bar the plaintiff in error obtained her decree, caused a sale, became the purchaser,

received her certificate of purchase, and procured in the decree (P. R., p. 36), that McCune, who was personally liable for the payment of the deficiency should still remain so liable. The other cases cited in our brief are equally as strong. That this court may have ready reference we will quote what the Supreme Court said in some of them. *Ogle v. Koerner supra* 179:

"A mortgage or, as in this case, a deed of trust in the "nature of a mortgage, vests in the party secured a lien "on the mortgage premises. By virtue of the lien the "mortgagee is entitled to have the mortgaged property "sold under a decree of foreclosure and the proceeds of "the sale applied to the payment of the debt secured. "This is the mode provided by law for the enforcement "of the lien, and when the lien has been once enforced "by the sale of the property it has, as to such property, "expended its force and accomplished its purpose and "the property is no longer subject to it."

In *Davis v. Dale, supra*, 243:

"By virtue of the lien created the mortgagee or *cestui* "*que trust* had the right to have the security foreclosed "and the property sold and the proceeds applied in pay- "ment of the secured debt. But when this has been done, "and the lien enforced by a sale of the property, and the "proceeds applied, the mortgage or trust deed has ex- "pended its force and the property is no longer subject "to its provisions (Ogle *v.* Koerner, 140 Ill., 170. Selig- "man *v.* Laubheimer, 58 Ill., 124). Nor does it in any "way affect the result that the holder of the secured in- "debtedness becomes the purchaser at the sale whether "he be the mortgagee or *cestui que trust* or not. By be- "coming the purchaser a new relation created by the "statute exists in no wise dependent upon any privity of "contract between the purchaser and mortgagor."

These decisions of the Supreme Court and others which we have cited in our brief, and still others to the same effect which are referred to in the opinion of the Supreme Court, which the bill complains of, were not rendered in view of the statute of 1872. Many of them were rendered long before either the McCune trust deed or the statute was ever thought of. What was the

Supreme Court to do in Lightcap *v.* Bradley. Overrule its former decisions, because, forsooth, if the court followed the principles of law which it had before announced and which were firmly implanted in the jurisprudence of the State, recognized and enforced as such for more than half a century, the plaintiff in error, by reason of her failure to obtain a deed which she was entitled to, through no fault except her own, would lose the land? Or was the court to follow settled principles of law upon which the people of the State had for generations depended? Happily, the day is past when courts will place the interests of the individual suitor above that of the whole people and will manufacture law to suit the individual case.

It is for the reason that the State Supreme Court saw fit to follow principles of law firmly settled and fixed in the jurisprudence of the State, rather than overrule them or make a departure into unexplored fields, that this case is before this court. On pages 58 and 59 of their brief they admit the State Supreme Court regarded its former decisions as the rule for its decision in Lightcap *v.* Bradley, but they contend that the Supreme Court misconstrued the force and effect of its former decision, hence it is inferentially argued that this court should correct the State Supreme Court in its misconception; but no authority or decision of the Supreme Court of Illinois, which holds a contrary doctrine to that announced in the opinion is cited. Upon principle and authority the learned judge who wrote the opinion well said:

"It is absurd to say that a mortgagee by neglecting "or refusing to take a deed by the expiration of five "years can thereby reinstate himself in the same posi- "tion as before the purchase. The land being freed "from the lien of the trust deed by the sale, the title "of the trustee was gone, and the only interest of the "defendant (plaintiff in error) was by virtue of the cer- "tificate of purchase. The sale of premises under a decree "of foreclosure, when the decree does not expressly "save any right to resort to the land again, is an abso- "lute discharge of the premises from the lien. In the

"absence of a provision for another sale the premises "will be discharged even from unmatured portion of "the debt. *Raines v. Mann*, 68 Ill., 264. Such a sale is "a sale of the land and all interests, both that which "the mortgagor had at the execution of the mortgage "and the interest of the mortgagee, and all other par- "ties to the suit. It is made by the court as vendor and "the sale discharges the land from the lien and trans- "forms it into the statutory lien by the certificate of "purpose. (Smith *v.* Smith, 32 Ill., 198.)"

When the land was sold that was the end of the trust deed and all rights thereunder. Mrs. Bradley, although she was the holder of the secured indebtedness, did not acquire by the purchase any greater, any other, or any different rights than any stranger would who might have been purchaser. *Davis v. Dale supra.* Thereafter she stood in the same position and sustained the same relation to the property and to the mortgagor as any other purchaser; no better, no worse. She no longer had any right to the possession whether her possession before was rightful or not. From and after the sale her rights were measured by the certificate of purchase under the statute the same as any other purchaser. The certificate of purchase did not convey or purport to convey or vest in her or the holder of it any title to the premises nor give any right to the possession thereof. The right to the possession after the sale was in Prettyman, the grantee of the mortgagor, and would remain in him until his title was transfered by the master's deed. The certificate of purchase was assignable at any time, either before or after redemption, by simple indorsement on the back thereof. (Revised Statutes of Illinois, Chap. 77, Sec. 29.) And an assignment of it would vest in the assignee the right to receive the redemption money or deed in case of no redemption, and it could be transferred to successive assignees as long as it had vitality, and each successive assignee would succeed to all the rights of the party to whom it was first issued, and a deed to any other party than the holder of it would be void and pass no title. Carpenter

v. Sherfy, 71 Ill., 427, 429. Even if the decree in the foreclosure suit had expressly provided that Mrs. Bradley should continue in possession of the premises after the sale and before obtaining a deed, it would have been reversible error. There was no way by which the mortgagor or his grantee could be deprived of his right to the possession until deed is made except by the appointment of a receiver, no other way is known to the law of Illinois. As far back as 1850 in McLane *v.* Brown, 11 Ill., 523, the Supreme Court of Illinois in determining the rights which the purchaser at execution sale and judgment debtor respectively had in land after sale and expiration of redemption, speaking through Mr. Justice Caton, said:

"In this State, at least, the principal estate continues "in the judgment debtor after the sale on execution, so "long as the equity of redemption continues, and, in- "deed, until the sheriff's deed is executed."

Again, in Bennett *v.* Matison, 41 Ill., 344, the Supreme Court, speaking through Mr. Justice Breese, said:

"No case can be found where a party has been put "in possession who was a purchaser at a judicial sale "before a deed has been executed to him by the officer "selling. Until he obtains a deed he is for most pur- "poses a stranger to the possession."

Indeed it is a well settled principle of the law of Illinois that a certificate of purchase is only a lien, that no title vests in the holder theerof, until he acquires the sheriff's or master's deed, and that the title of a judgment debtor or of a mortgagor is not divested until the deed is executed. This question has been passed upon by the Supreme Court of Illinois in a number of cases, many of them long before the McCune trust deed was even thought of, among which is Johnson *v.* Baker, 38 Ill., 98, decided at the April term, 1865, in which the court held that until the holder of the certificate of purchase acquires the Sheriff's deed after redemption expires, he is only regarded as a bidder. So in Stephens *v.* Illinois M. F. Ins. Co., 43 Ill., 327, decided January term, 1867. The Supreme Court states the law to be that the pur-

chaser under a master's sale on foreclosure of a mortgage acquires no title until the deed is made. That while the deed will relate back to the beginning of the lien in order to cut off intervening incumbrances, yet it will not carry back the absolute divestiture of title, and that until the deed is made the mortgagor still has the estate of a mortgagor with the qualification that the amount and time of redemption has been absolutely fixed by the decree and sale.

In the case of Bennett *v.* Matson, 41 Ill., 322, April term, 1866, the court holds that a purchaser at a judicial sale is not entitled to possession before the deed is executed, that until he obtains his deed he is for most purposes a stranger to the possession.

These cases are followed by Rockwell *v.* Servant, 63 Ill., 424, decided at the January term, 1872, declaring the same principal, and at the September term, 1873, in Hays *v.* Cassell, 70 Ill., 669, 672, the court recites the law in these words: "The certificate of purchase con-"veyed no title to the purchaser, nor did it disturb the "possession of the defendant. That title continued in "him, and would remain until fifteen months had elapsed "*and his title transferred by the sheriff's deed.*" So in O'Brien *v.* Fay, 82 Ill., 277, the court says: "By our "law the defendant is entitled to the possession between "the day of sale and the making of the master's deed." In the case of Lightcap *v.* Bradley, 186 Ill., 510, the cases are carefully reviewed by the court, and the court there finds the law of Illinois to be as we have stated. How could it be otherwise, there is no provision in the statute or law of Illinois that a certificate of purchase shall transfer title, nor does the certificate itself purport to pass any title either in fee, remainder, reversion, a term of years, or any other estate. On the contrary, it negatives the very idea of a transfer of title by telling the holder of it when he will be entitled to a deed if the property be not redeemed. As was said by the State Supreme Court in Johnson *v.* Bantock, 38 Ill., 114: "It "contains no words which impart a grant, release or "transfer of the land, or title this to every deed of con-

"veyance is essential. It is only by apt and proper "words and language that title can be passed or trans- "ferred from one person to another." The certificate only purports to give the legal holder of it a right to have the title transferred to him by deed at the expiration of the period of redemption if the property be not redeemed. At the expiration of fifteen months, when redemption expires, the holder of a certificate has the right to dmand a deed at any time within the statutory limitation of five years, which deed, when executed will transfer the title which the mortgagor had at the time the mortgage was executed, to the recipient of the deed, but the holder of the certificate is never vested with title, and the title of the mortgagor is never actually divested until the master's deed is executed, and the holder of the certificate can not be compelled to take the deed if he does not want it.

IV.

The bill on its face shows, that under the law of Illinois, the plaintiff in error had no legal or equitable title to support her bill.

In a former part of our argument we said this statute complained of was a limitation statute and so held to be by the State Supreme Court in the first seven cases cited in our brief, but that we should have occasion to call the court's attention to them in a subsequent part of our argument we passed them without comment. We now invite the attention of the court to them, not only to show that the Supreme Court holds it to be a statute of limitation, but also to show, in addition to the authorities already cited, that when her right to a deed became barred by the statute, she thereafter had no right, title, claim, or interest in the land either in law or equity. Let us take them up in their order.

Ryhiner *v.* Frank, 105 Ill., 326, was an action of ejectment. Ryhiner commenced an action of ejectment against Frank to recover certain lots in Effingham. One Newbank was the common source of title.

One source of the plaintiff's title was a sheriff's deed executed to him on a certificate of purchase from the sheriff, who had sold the lots under execution on a judgment *r.* Newbank rendered on the 6th of March, 1871, upon which execution issued and the land sold Aug. 7, 1871, the judgment was rendered while he owned property, and prior to a trust deed which he gave on the property. The property was sold under the trust deed and the defendant connected himself with the title under this sale. No deed was taken out on the sheriff's certificate of purchase until Dec. 21, 1878, at which last date Ryhiner, to whom the certificate of purchase had been assigned, received a sheriff's deed. This was upward of five years and ten months after the expiration of the time of redemption, and the objection was made in that case as in this, only with much stronger reasons that the statute did not and could not apply, that rights were vested in the holder of the certificate prior to the passage and taking effect of the statute. And that as the sale was made and certificate issued in 1871, nearly a year before the act of 1872 went into effect, and at that time there was no express limitation limiting the time when deed could be taken out, and as the court had declared in Rucker *r.* Dooley a deed might be issued at any time within eight years and three months after sale, or seven years after expiration of redemption, to apply the statute of limitation subsequently prescribed, deprived the holder of the certificate of vested rights; but the court held otherwise. Mr. J. Sheldon, speaking for the court as a unit said (330):

"The objection is not valid that the statute fixes a "limitation for taking out the deed, different from that "declared by this court in Rucker *r.* Dooley, 49 Ill., 383, "and that the judgment and sale under it were prior "to the passage of the statute. The statute was one "of limitation and effected only the remedy. It took "away no vested right and like all other statutes of "limitation, was free from objection on this score, where "a reasonable time, as was the case here, is left for the "pursuit of the remedy. It was surely competent for

"the legislature to change the time of limitation which "had previously been declared by this court."

Again in Peterson *v.* Emmerson, 135 Ill., 55, 59, 60. This was a bill in chancery by Elizabeth Emmerson to compel the master in chancery to execute a deed on a certificate of purchase which had become barred by this same section of the statute which bars the plaintiff in this case.

In 1865 one Peterson, the then husband of Mrs. Emmerson, gave a mortgage to one Emmerson on 40 acres of land to secure an indebtedness. She joined in the execution of the mortgage. Peterson died in 1866 leaving his widow and two children by a former wife, a son and daughter, the daughter married Hiram Smith, and died leaving an infant child in 1867. Peterson's widow married Emmerson, the mortgagee. She resided on the land during her widowhood and for a time after she married Emmerson, when they moved off of it. In 1871 Emmerson foreclosed his mortgage, and on November 25, 1871, the master in chancery sold the land under the decree of foreclosure and Mrs. Emmerson bid it off and received the certificate of purchase. In 1872 she took possession of the premises and continued in possession, received the rents and profits, and paid all taxes, and was in possession at time she filed her bill, but no deed was ever executed on the certificate of purchase. Fifteen years, 10 months, and 11 days elapsed after the expiration of the period of redemption, and the filing of the bill.

It was urged (see Ab. of Argument, pp. 56, 57) that the statute of 1872 did not apply because the sale was made and certificate of purchase issued before the statute was enacted; also that the rights of the parties were not affected or changed by the decree of foreclosure and sale thereunder. That the decree of foreclosure was still in force and that the title of the heirs of the mortgagor were divested by their failure to redeem, that even if the certificate of purchase was dead for the purpose of getting a deed, still the whole suit of foreclosure, decree and sale was left unimpaired. That Mrs. Emmerson had everything she

needed including the possession of the land except the evidence of her title. That she was the owner of the property in equity, but lacked evidence of it. The circuit court sustained her contentions, and the heirs of the mortgagor took the case to the Supreme Court of the State. Mr. Justice Baker delivered the unanimous opinion of the court and after reaffirming what was said by the court in Ryhiner *v.* Frank *supra* said pp. 59, 60: "It is also urged that it lies within the "general equity powers of the chancery court to order "and decree that the master should execute and deliver "to defendant in error a conveyance of the land, predi- "cated upon the foreclosure sale of November, 1871, and "Rucker *v.* Dooley, 49 Ill., 377, and Schrader *v.* Peach, "77 Ill., 615, are cited as authority in that behalf.

"Rucker *v.* Dooley was decided prior to the enactment "of 1872 and when there was no express legislation on "the subject, and the court there formulated, based "upon the analogies of the law, a rule which it deemed "equitable and just. That rule was, that the lapse of "twenty years from the date of sale and certificate was "an *insuperable* bar to the execution of a deed; that "after the expiration of fifteen months allowed for re- "demption, and within eight years and three months "from the date of sale, a deed should be made by the "proper officer upon presentation of the certificate of "purchase, and that after the eight years and three "months had elapsed, and within twenty years, a deed "*might* be made upon an order of court entered after "notice to parties interested. But this rule was abro- "gated by the legislative enactment of 1872, not only "in respect to the period of limitation, but also by the "provision that if a deed was not taken out within the "time limited, the certificate should be null and void. "It is sticking in the bark to say, that notwithstanding "the certificate is null and void, yet the *sale* which it "was given to evidence has such vitality and force that "a court may decree, by virtue thereof, the preemptory "and absolute transfer by its officer of the property and "title of one person to another and different persons. "It does not alter the case that defendant in error has

"been in actual possession of the land since 1872 claim-
"ing ownership and has paid all the taxes assessed
"thereon. Such acts do not take the case out of the
"statute as to justify the transfer to her of the legal title
"vested in the heirs of the mortgagor."

The question was before the Supreme Court again in Seeberger *v.* Weinberg, 151 Ill., 369, 373-4, 380-1.

It was a bill in chancery by Seeberger, against the heirs of the mortgagor and other parties. The substantial facts so far as this case is concerned are as follows. Seeberger being the owner of the lot in controversy conveyed the same to one John Farr, on June 3, 1872, for $1,700. $900 of the purchase price was secured by Farr executing three notes to Seeberger for $300 each, and secured the same by trust deed on the lots to one Hodges as trustee. In 1873 Farr conveyed the lots to his wife, Sarah Ann Farr, and subsequently died. Default was made in the payment of the notes and a bill in chancery to foreclose the trust deeds was filed upon which a decree of foreclosure, was entered in January, 1876; under this decree the lots were sold by the master in chancery February 14, 1876, and Seeberger, the *cestui que trust*, bid the same off, became the purchaser, and received the master's certificate of purchase. No redemption was made, and no deed taken out on the certificate of purchase. From the date of the sale, however, Seeberger claimed the lots and paid all taxes and assessments thereon and built sidewalks on the street adjacent thereto. In 1892 Seeberger contracted to sell the lots to Fanny Weinberg, part of the purchase price was paid and Seeberger was to furnish an abstract of title so that Mrs. Weinberg could have her attorneys examine the same, which was done, and the attorneys discovered that no deed was ever taken out on the certificate of purchase, and so informed Seeberger. Mrs. Weinberg then proceeded to get a deed for the lots from Mrs. Farr and the heirs of the mortgagor, and thereupon Seeberger filed his bill setting up the facts and claiming to own the property, &c., &c. The bill was heard on pleadings and proof and the lower courts dismissed the bill, and on appeal to the Supreme Court the decree was

affirmed. Mr. Justice Bailey delivered the unanimous opinion of the court, and after referring to the statute and to the prior decisions of the court said:

"After the expiration of five years given by the statute "for taking out a master's deed, the certificate of pur- "chase became a nullity, and a court of equity can not "compel, or authorize, the execution of a deed to the pur- "chaser or his assignees by the officer whose duty it is "to make such deed. Such being the condition of Seeber "ger's title it is difficult to see upon what legal or equita- "ble principle he can now be entitled, as against the "grantees of Farr, to any portion of the relief prayed for "in the bill. His certificate of purchase being *functus* "*officio* and void, he certainly could have had no remedy "against the heirs or representatives of Farr if they had "still retained their interest. No remedy could have been "asserted by him upon the certificate as that had become "a nullity, nor could he have enforced any remedy upon "the original mortgage as that remedy had been com- "pletely exhausted by the foreclosure and sale. Here the "interest in the land acquired by Seeberger by means of "his purchase at the foreclosure sale, and evidenced by "the certificate of purchase, having been barred by limi- "tation, the only title to the property capable of asser- "tion was that remaining in the grantee or legal repre- "sentative of Farr, the mortgagor. If Mrs. Weinberg had "not succeeded in securing the title by purchase from "those in whom it was vested, it might have been as- "serted by them, or purchased by some third party to "the exclusion of both her and Seeberger."

Again, in Brown *v.* Ridenhower, 161 Ill., 239. This was a bill in chancery to set aside two deeds under following state of facts. In 1858 one James Finney being the owner of the land executed a mortgage thereon to one Misenheimer to secure the payment of $127.50. In 1863 Misenheimer filed a bill to foreclose the mortgage, he obtained a decree and one Graham was appointed a special commissioner to sell the land, which he proceeded to do on Sept. 5, 1863. Misenheimer was the highest bidder and secured the certificate of purchase, and the special commissioner made a report of the sale,

which was approved. Finney died in March, 1866, without having redeemed the land from the sale. No master's or commissioner's deed was ever issued. Ridenhower was in possession of the land holding the same under a regular chain of conveyances from Misenheimer. In 1892 the heirs of Finney, the mortgagor, conveyed the land to Brown and the bill was filed to set aside this deed as a cloud upon Ridenhower's title, and the court held, Mr. Justice Magruder delivering the opinion, that the holder of the certificate had no title in law or equity to support the bill, and reversed the decree of the lower court granting the relief, and in doing so quoted with approval what was said by the court in Seeberger *v.* Weinberg, and said "whether the lapse of "time is to be given the effect of extinguishing his right, "or merely barring his remedy, he has no further title or "interest in the premises described in the certificate "which either he or his grantee can enforce either in law "or in equity."

The statute complained of has been in force for nearly a third of a century, and for more than one-third of the existence of Illinois as a State. One and only one construction has ever been given to it, viz.: as a limitation statute, and no other effect has ever been given to it in this case or any other, and as was said by this court in Saranac L. Co. *v.* Comptroller, 177 U. S., 330, "a statute of limitation will bar any right, however high the source from which it may be derived, provided a reasonable time is given a party to enforce his right."

V.

The bill shows, and so states that the controversy in the ejectment suit was as to the effect of the statute complained of. The effect of the statute involved its validity and construction, and it is the construction and effect the State Supreme Court gave it that forms the chief ground of complaint in the bill.

It is because the State Supreme Court did not agree with her, in her version of the laws of Illinois relating to mortgages, and the effect of a valid foreclosure and sale,

and in the construction and application of the statute complained of, that she seeks the aid of the equity side of the State Circuit Court. But how, and in what way was that court to aid her? If that court found the law of Illinois to be, as the Supreme Court of the State says it was and that the statute complained of, was correctly construed and applied, it would necessarily have to deny her the relief asked for, It could only grant her the relief on finding that the State Supreme Court erred in its judgment as to the law and its application. What was this, more or less, than making a Court of Review out of the State Circuit Court as a court of equity to review and correct alleged errors made by the Supreme Court of the State, on the ground, that such errors, if they existed, contravened some provisions of the Federal Constitution.

We have been unable to find any authority which would bring the object and scope of the bill in this case within the jurisdiction of the Circuit Court, and we were cited to none, by the learned counsel representing appellant, when the case was presented in the lower court, and to none in this court. It is new doctrine that an inferior court of the State can sit in review upon the findings and judgment of the Supreme Court.

The State Circuit Court has no supervisory power over the State Supreme Court. The supervisory power is just the reverse. There is not a question of fact, or law, presented in the bill or amended bill that was not, or might not, have been presented upon the record in the ejectment suit, at the first trial of the same. In fact, the decision of the Supreme Court, in the ejectment suit, upon the questions which were actually and directly presented to that court for its determination and judgment, is made the basis of the bill, and is the only ground on which the claim of a Federal question rests, and it is because the State Supreme Court did not observe the Federal Constitution in the ejectment suit, according to her ideas that she files the bill. There is, and can be no question raised as to the jurisdiction of the State Supreme Court. In fact, the subject-matter in dispute, and the parties were peculiar within its jurisdic-

tion, and having litigated the question in a competent tribunal, and been defeated, can she litigate the same questions in another tribunal, acting independently and having no appellate jurisdiction? As was said by this court in Forsyth *v.* Hammond, 166 U. S., 516, 518: "The "question is, not whether the judgment of the Supreme "Court would be conclusive as to the questions involved, "in another action, between other parties, but whether it "is not binding between the same parties in that, or any "other forum? The principles controlling the doctrine "of *res judicata* have so often been announced and are so "universally recognized, that the citation of authorities "is scarcely necessary. Though the form and cause of "action be different, a decision by a court of competent "jurisdiction, in respect to any essential fact, or ques- "tion, in the one action, is conclusive between the parties "in all subsequent actions."

It is no answer to the application of the principle *res judicata* that the question sought to be raised by the bill was not raised, or was not raised in such a way, or form, as would permit of a reexamination and review of them by this court. The principle applies, not only to points upon which the court was actually required to form an opinion, or pronounce judgment, but to every point which properly belonged to the subject-matter of litigation, and which the parties might have brought forward at the time. In Beloit *v.* Morgan, 7 Wall., 621, this court, speaking through Mr. Justice Swain, said: "It extends not only to the question of fact and law, "which were decided in the former litigation, but also "to the grounds of recovery or defense which might "have been, but were not presented."

That she did not make and preserve in the record in the ejectment suit, on its first trial in the State Circuit Court, and in the State Supreme Court on the appeal, the questions which would permit of this case being brought into this court by writ of error, does not militate against the application of the doctrine of *res judicata*. She might have done so.

By the bill she deliberately avers, and admits, that every claim and right, to the lands, which she has, was

presented in and by the record of the trial of the ejectment suit, and was presented to the Supreme Court. In the bill, P. R., p. 15, will be found this deliberate statement: "But oratrix will not be able at that trial (i. e., retrial of the ejectment suit), to offer any other or different defense than she has already presented, and under the decisions of the Supreme Court of Illinois, construing and applying the said act of 1872 to deprive her of vested property, and contract right, the result of such trial must, necessarily, be adverse to oratrix, and result in a judgment from which she could not obtain relief, unless the court shall grant the relief herein prayed, and defendant be enjoined from the further prosecution of said suit." It will be seen that the reason she files her bill, is because the State Supreme Court, in construing and applying the act of 1872, "deprived her of vested property and contract right." If that is true, then the Federal question is to be found in the proceedings in the ejectment suit and must be determined in the suit in which it arose, and not in an independent suit for the purpose. If the statute violates the Federal Constitution, or if a certain construction of it renders it obnoxious to that instrument, the courts of law of the State have perfect authority to so declare, and it is their duty to so declare in any proceeding where the validity of the statute, or its construction, arises, and if the highest court of the State erroneously upholds it, or places a construction upon it which renders it obnoxious to the Federal Constitution, the remedy of the party aggrieved is by writ of error, from this court to the State Supreme Court, as provided by Sec. 709, Chap. 11, Title 13, of the Revised Statutes of the U. S., which affords a complete and adequate remedy at law, so that a court of equity would have no jurisdiction to inquire into the validity of the statute, or the application or construction of the same, by the State Supreme Court, which was the subject-matter under consideration, in litigation already begun and then pending in a court of law. Nor does her failure to properly raise and preserve the Federal question in the proceedings at law, authorize a court of chancery to interfere, nor render

any the less conclusive upon the State Circuit Court, the decision of the State Supreme Court. Johnson Co. *v.* Wharton, 152 U. S., 252, 256, 260 and cases cited.

The principles of law announced by the State Supreme Court, on the appeal in the ejectment suit, became the law in the case, binding alike on all courts, even the State Supreme Court, on second appeal, until reversed by this court which alone has supervisory power over the decision of that court.

In Manufacturing Co. *v.* Wire Fence Co., 119 Ill., 30, 42, the Supreme Court of Illinois, in passing upon the conclusiveness of a prior decision in the same case said: "We are not at liberty to review and overrule any former "ruling in the case. It is well settled, and, as we under- "stand, not denied by counsel for appellant, first, where "a question of either law or facts, is decided by this court "in a case properly before it for such decision, the same "question can not be again raised in that case, except "upon petition for rehearing; second, where a case has "been heard in the trial court, reviewed in this court "and remanded to the trial court with direction as to "the decree it shall enter, on a subsequent appeal to "this court, error can not be assigned for any cause that "existed prior to the former decision in this court."

In Reid *v.* West., 70 Ill., 479, the Supreme Court expressly declared that "it has no power to review its "previous judgment, except upon a petition for a re- "hearing, presented in accordance with the rules estab- "lished for that purpose."

The reports of the decisions of the Supreme Court of Illinois contain numerous decisions of that court, that a second appeal in the same case, where the first decision covers the merit of the controversy, brings up only the subsequent proceedings had after the mandate of the court of last resort was sent down. This also is the doctrine held by this court, a case illustrative of which is Washington Bridge Co. *v.* Stewart et al., 3 How., 424, 425, where this court announced the same principles as are announced by the Supreme Court of Illinois. It is manifest upon the face of the bill that the object and purpose for which it was filed, was to get the alleged

Federal question which arose in the ejectment suit, and which she had failed to preserve in such a way as to bring before this court on writ of error, and which would be *res adjudicata* on a second appeal of the ejectment suit, in some shape or form before this court.

It is a settled rule that where a party has a right which he might have enforced through the aid of a court at law, but instead of calling upon the court for that purpose, he sleeps upon his rights until his right to call upon the court of law for assistance is barred by the statute of limitation, a court of equity will not thereafter afford him any relief; also that where there is a legal and an equitable remedy in respect to the same subject-matter, the latter is under the control of the same statutory bar as the former.

In Metropolitan National Bank *v.* St. Louis Despatch Co., 149 U. S., 448, this court said: "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitation which governs actions at law."

And this is repeated with approval in Baker *v.* Cummings, 169 U. S., 206.

Applying these principles to the facts in this case, what is the result? Her bill shows that she had the right to demand a deed for the land in controversy on the 28th day of January, 1881, and thereafter at any time within the next five years. The deed, when executed by the master, would have as completely and perfectly vested in her the absolute title and estate in the premises, and would have been as perfect and complete protection to her, as the relief which she now asks for at the hands of the chancellor; and further she had, during the entire term of five years, the unquestionable right to compel the execution of the deed by *mandamus* which afforded her a full, perfect and complete remedy at law.

Now having failed through her own negligence to seek the remedy which the law offered her, until her right to resort to that forum is barred by the statute, what valid excuse does she offer for her laches? We fail to find any in her bill, and none has ever been called to our atten-

tion. There is no valid excuse, and now to call upon a court of equity to grant the relief prayed for, is nothing short of asking that court to annul the mandate of the statute complained of.

As the correctness of the decision of the State Supreme Court which the bills attack, is involved and will form one branch of Bradley *v.* Lightcap, No. 243, on the docket of this court, and this case is to be heard with that, we deem it unnecessary to repeat what we have said in regard to the opinion and laws of Illinois in our brief and argument in that cause, but will ask the court to consider the same as though repeated herein.

We submit, the State Supreme Court made no error in its judgment and decree, and that its decree and judgment should be affirmed, or writ dismissed in accordance with the practice of this court.

Respectfully submitted,

GEO. W. WALL,
E. A. WALLACE,
LYMAN LACEY, JR.,
Solicitors and Counsel for Appellee.

doer. That is to say, though Mrs. Bradley was rightfully in possession and though the mortgage debt had not in fact been paid, the bar of the statute as to the deed is held to be efficacious in turning Mrs. Bradley into a trespasser as respects the mortgagor, who, not having in fact paid anything, is treated as having made payment by the mortgagee's bid, and being at the same time entitled to assert the failure of the purchase by reason of *laches* in taking out the deed.

And yet because a statute may take away the sword which a deed would give a mortgagee out of possession, it does not follow that it can lawfully operate on prior transactions so as to take away the shield afforded by possession. Rightful possession is a defense in ejectment, *Sands* v. *Wacaser*, 149 Ill. 530, 533, and cases cited, and Mrs. Bradley's possession could only be treated as wrongful as against the original mortgagor by the application of the subsequent law.

As we have said, when Mrs. Bradley took this mortgage there was no statutory limitation as to the time within which a master's deed must be taken out, and no loss of right by reason of failure to do so was prescribed. After she had filed her bill, and while she was in possession, the act of 1872 went into effect, and, it may be conceded, limited Mrs. Bradley's right to obtain a deed on foreclosure sale and so far affected any remedy through a deed she might have had. But, reading the act, as the view of the Supreme Court compels us to do, as taking away her right to maintain her possession, we are of opinion that it materially impairs the obligation of her contract, and deprives her of property without due process.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

No. 306.

Lydia Bradley, Plaintiff in Error, *vs.* H. W. Lightcap. } In error to the Supreme Court of the State of Illinois.

[May 31, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

After the decision reported 186 Ill. 510, Mrs. Bradley filed her bill in equity in the Circuit Court of Fulton County, Illinois, to quiet her title to the land in controversy in the action in ejectment and for appropriate relief. The bill was dismissed on demurrer and Mrs. Bradley carried the case to the Supreme Court of Illinois, which affirmed the decree below. *Bradley*

v. *Lightcap*, 202 Ill. 154, April 24, 1903. Three of the members of the court dissented. The opinion of the Supreme Court proceeded on the strength of the decisions in 186 Ill. 510, and 201 Ill. 511.

As we have reversed the judgment in the prior case, this case must take the same course.

Decree reversed and cause remanded for further proceedings not inconsistent with our opinion in No. 243.

No. 343.

Lydia Bradley, Appellant, *vs.* H. W. Lightcap. } Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[May 31, 1904.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

This was a bill filed by Mrs. Bradley, to quiet her title to the premises in controversy in No. 243, and for appropriate relief, in the Circuit Court of the United States for the Northern District of Illinois, and was dismissed for want of jurisdiction, May 22, 1902.

The Circuit Court, Grosscup J., was of opinion that the statute of 1872 was not one of limitation in the same sense as a statute limiting the time within which foreclosure proceedings must be brought; that the failure to take out the deed within five years raised no presumption that the mortgage debt had been paid; and that the act was, in effect, simply a limitation on the time within which the foreclosure decree could be availed of, and did not operate to forfeit the mortgagee's title to the mortgagor if the deed were not taken out. But he thought that Mrs. Bradley's title by possession as mortgagee had not been held by the State court to have been cut off by the statute of 1872, as the record in that court stood, as reported in 186 Ill. 510, and that, therefore, the constitutional question did not arise. If, however, the Supreme Court had ruled that her title as mortgagee in possession had been so destroyed, the remedy was by writ of error from the Supreme Court of the United States. The decision in 201 Ill. 511, was rendered February 18, 1903. Taking into view the controversy as presented in the two other cases, and that the judgments in those cases are now directed to be reversed, and bearing in mind that a case does not necessarily arise under the Constitution or laws of the United States every time a writ of error would lie to the judgment of the State court, the decree of the Circuit Court will be

Affirmed.